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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 187.

SQUIRE B. RUDE, HENRY HUSTED, AND AMERICUS E. JOHNSON, ADMINISTRATORS OF GEORGE W. RUDE, DECEASED, AND WILLIAM M. SNYDER, EXECUTOR OF JOHN R. RUDE, DECEASED, APPELLANTS,

vs.

JOHN M. WESCOTT AND HENRY LEWIS, JOHN T. WEST AND EDWARD A. FERGUSON, EXECUTORS OF CHARLES W. WEST, DECEASED.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

FILED OCTOBER 27, 1885.

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1 Pleas of the circuit court of the United States for the district of Indiana, begun and holden at the United States courthouse, in the city of Indianapolis, in said district, on the first Tuesday in May, in the year of our Lord one thousand eight hundred and eighty-five, before the Honorable William A. Woods, judge of the district court of the United States for said district and *ex officio* judge of said circuit court.

JOHN M. WESTCOTT and HENRY LEWIS, JOHN T. West and Edward A. Ferguson, Executors of the Last Will and Testament of Charles W. West, Deceased, Complainants by Order of Revivor,

vs.

SQUIRE B. RUDE and HENRY HUSTED and AMERICUS E. Johnson, Administrators of George W. Rude, Deceased, and William M. Snyder, Executor of the Last Will and Testament of John R. Rude, Deceased, Defendants by Order of Revivor.

Chancery. 4314.

Be it remembered that heretofore, to wit, at the November term of said court, on the 10th day of March, 1876, before the Honorable Walter Q. Gresham, one of the judges of said court, the following proceedings in the above-entitled cause were had, to wit:

2 Come now the complainants, by S. A. Bowman Esq., their solicitor, and file their bill of complaint herein in the words following, to wit:

John M. Westcott, a citizen and resident of the State of Indiana, and Charles W. West, a citizen and resident of the State of Ohio, bring this their bill of complaint against Squire Rude, George Rude, and John Rude, citizens and residents of Liberty, in the State and district of Indiana; and thereupon your orators complain and say—

That they are informed and believe that one Hiram Moore was the first and original inventor of new and useful improvements in seeding machines, fully described in the letters patent hereinafter mentioned, and which had not been known or used before his said invention.

And your orators further show unto your honors that said Hiram Moore, being, so as aforesaid, the first inventor and discoverer of said improvements, and being also a citizen of the United States, did, on the 20th day of November, 1860, upon due application therefor, obtain letters patent of the United States, in due form of law, under the seal of the Patent Office of the United States, signed by the Secretary of the Interior and countersigned by the Commissioner of Patents of the United States, bearing date the day and year last aforesaid, whereby there was granted to said Hiram Moore, his heirs, executors, administrators, and assigns, or intended so to be, for the term of fourteen years from and after the date of said letters patent, the full and exclusive right and privilege of making, con-

3 structing, using, and vending to others to be used, the said inventions and improvements, which said letters patent are now remaining of record in the Patent Office of the United States, and by virtue whereof the said Hiram Moore became and was the sole owner of all the rights and privileges granted and secured by said letters patent, as by said letters patent or a duly authenticated copy thereof, in court ready to be produced, if required, will fully appear.

And your orators further show unto your honors that said Hiram Moore, within the time required by the statute in such case made and provided, made application in writing to the Commissioner of Patents of the United States, setting forth that he desired an extension of said letters patent and the grounds thereof, and, having in all respects complied with the acts of Congress in such case made and provided, and the Commissioner of Patents having caused due notice to be given of the time and place of the hearing of said application as required by law, did, on the 19th day of November, 1874, upon the evidence produced and submitted to him, duly and legally decide that said patent ought to be extended; and thereupon, on said 19th day of November, 1874, said Commissioner of Patents did make on said letters patent a certificate under the seal of the Patent Office of the United States, signed by the Commissioner of Patents of the United States and bearing date the day and year last aforesaid, renewing and extending for the period of seven years from and after the 20th day of November, 1874, the said letters patent
4 granted to said Hiram Moore as aforesaid, which certificate
was thereafter duly recorded in the Patent Office of the United States, as by said certificate or a duly authenticated copy thereof, in court ready to be produced, if required, will fully appear.

And your orators further show unto your honors that they are informed and believe that said Hiram Moore was the first and original inventor of certain other new and useful improvements in sending machines, fully described in the letters patent hereinafter mentioned, and which had not been known or used before his said invention.

And your orators further show unto your honors that Hiram Moore, being, so as aforesaid, the first and original inventor and discoverer of said improvements, and being also a citizen of the United States, did, on the 26th day of March, 1861, upon due application therefor, obtain letters patent of the United States for said invention, in due form of law, under the seal of the Patent Office of the United States, signed by the Secretary of the Interior and countersigned by the Commissioner of Patents of the United States, bearing date the day and year last aforesaid, whereby there was granted to said Hiram Moore, his heirs, executors, administrators, and assigns, or intended so to be, for the term of seventeen years from and after the date of said letters patent, the full and exclusive right and privilege of making, constructing, using, and vending to others to be used, the said in-
5 vention and improvements, which said letters patent are now
remaining of record in the Patent Office of the United States, and by virtue whereof said Hiram Moore became and was the sole owner of all the rights granted and secured by said letters patent, as by

said letters patent or a duly authenticated copy thereof, in court ready to be produced, if required, will fully appear.

And your orators further show unto your honors that said Hiram Moore, on the 6th day of October, 1874, by an assignment in writing dated the day and year last aforesaid, sold, assigned, and transferred unto your orators, John M. Westcott and Charles W. West, all the right, title, and interest of him, the said Hiram Moore, in and to each and all of said inventions and improvements by virtue of the several letters patent as aforesaid, and also all the right, title, and interest of said Hiram Moore in and to any and all renewals or extensions of either or both of said letters patent, and including the extension of the hereinbefore first-mentioned letters patent (the petition for which extension was then pending before the Commissioner of Patents of the United States, and which extension was, on the 19th day of November, 1874, granted said Hiram Moore as aforesaid), which said assignment was thereafter duly recorded in the Patent Office of the United States, as by said assignment or a duly authenticated copy thereof, in court ready to be produced, if required, will fully appear.

6 And your orators further show unto your honors that by virtue of the premises and the aforesaid assignment of said Hiram Moore to your orators, your orators, John M. Westcott and Charles W. West, became and now are the sole and legal owners of each and all said letters patent and inventions and of all the rights and privileges granted and secured thereby and by the extension thereof as aforesaid within and throughout the United States.

And your orators further show unto you honors that the devices described and claimed in said several letters patent are capable of use and are used in one and the same seeding machine.

Yet the said defendants, well knowing the premises and the right secured to your orators aforesaid, but contriving to injure your orators and to deprive them of the benefits and advantages which might and otherwise would accrue unto them from said several inventions, after the granting of said several letters patent to said Hiram Moore, and since the assignments thereof to your orators, and before the commencement of this suit, made and used seeding machines in said district of Indiana and there sold them to others to be used in said district, and that they have carried on the business of making and selling them by agents and otherwise in various other places in the United States, and that such manufacture and sale has been and still is without the license or consent and
7 against the will of your orators and in violation of their
rights and in infringement of the aforesaid letters patent No. 30685, which were issued to said Hiram Moore November 20th, 1860, and extended for the term of seven years from and after the 20th day of November, 1874, as aforesaid, and in infringement and violation of said letters patent No. 31819, which were issued to said Hiram Moore March 26th, 1861, and that said unlawful acts and infringements have been committed with a full knowledge of the rights of your orators and in defiance of their rights, and that said

defendants, since the assignment of said several letters patent by said Hiram Moore to your orators as aforesaid and prior to the commencement of this suit, in the town of Liberty, in said State and district of Indiana, have constructed and had in progress of construction and have sold and offered for sale seeding machines made according to, employing, containing, and using said several inventions and improvements and substantial and material parts thereof, and that said defendants still continue so to do, and are threatening to make and cause to be made, use, and sell the aforesaid seeding machines in large quantities and to supply the market therewith and sell the same for such prices as they can obtain, to the effect of depriving your orators of sales of their seeding machines.

And your orators further show unto your honors that the actings and doings of the said defendants are all in defiance of the
8 rights acquired by and secured to your orators aforesaid, and to their great irreparable loss and injury, and by which they have been and still are being deprived of great gains and profits which they might and otherwise would have obtained, but which have been received and enjoyed by said defendants by and through their unlawful acts and doings.

And your orators further show unto your honors, on information and belief, that said defendants have made, used, and sold a large number of said seeding machines and have a large number on hand which they are offering for sale and have made and realized large profits and advantages therefrom, but to what extent and how much exactly your orators do not know and pray a discovery thereof; and your orators say that the use of said inventions by said defendants, and their preparation for and avowed determination to continue the same, and their other aforesaid unlawful acts in disregard and defiance of the rights of your orators have the effect to encourage and induce others to venture to infringe said patent in disregard of your orators' rights.

And your orators further show unto your honors that they caused notice to be given the said defendants of said infringements and of the rights of your orators in the premises and requested them to desist and refrain therefrom, but they have disregarded said notice and refused to desist from said infringement and have continued to make and sell said machines as aforesaid and to cause said patent
9 to be infringed by others in disregard of your orators' aforesaid rights.

And your orators further show unto your honors, upon information and belief, that the defendants in this suit are engaged in the infringements and unlawful acts complained of in the said town of Liberty, in said district of Indiana; but whether defendants have been so engaged in the manufacture, use, and sale of said seeding machines in other places or whether they have been otherwise concerned therein your orators do not know and cannot state and pray a discovery thereof by said defendants, and that they may fully and particularly state and set forth how and where they are and have been engaged as aforesaid in the manufacture, use, and sale of said seeding machines, and how long they have been engaged or concerned therein, and in what way.

And forasmuch as your orators can have no adequate relief, except in this court, to the end, therefore, that said defendants may, if they can, show why your orators should not have the relief hereby prayed, and may, upon their corporal oaths and according to their best and utmost knowledge, remembrance, information, and belief, full, true, direct, and perfect answers make to the premises and to all the several matters hereinbefore stated and charged as fully and particularly as if severally and separately interrogated as to each and every of said matters, and may be compelled to account for and pay to your
orators the profits acquired and damages suffered by your
10 orators from the aforesaid unlawful acts;

And your orators pray that the said defendants, their servants, agents, attorneys, confederates, and workmen, each and every one of them, may be restrained and enjoined by the order and injunction of this honorable court from directly or indirectly making, constructing, using, vending, delivering, working, or putting into practice, operation, or use or in anywise counterfeiting or imitating the said inventions or any part thereof or any seeding machine made in accordance therewith or like or similar to those which they have heretofore made, used, or sold, and that the said defendants may be decreed to pay the costs of this suit, and that your orators may have such further relief as shall to this honorable court seem meet and shall be agreeable to equity—

May it please your honors to grant unto your orators the writ of injunction, as well provisional as perpetual, issuing out of and under the seal of this honorable court, in due form of law, commanding, enjoining, and restraining the said defendants and their servants, agents, attorneys, confederates, workmen, and each and every one of them as hereinbefore in that behalf prayed.

May it please your honors to grant unto our orators the writ of subpœna issuing out of and under the seal of this honorable court, directed to said defendants, commanding them, by a certain day and under a certain penalty, to be and appear in this honorable court,
then and there to answer the premises and to stand to and abide
11 such order and decree as may be made against them; and
your orators will ever pray, &c.

JOHN M. WESTCOTT.

S. A. BOWMAN,
Complainants' Sol'r, Springfield, O.

UNITED STATES OF AMERICA, } *ss:*
Southern District of Ohio, }

Personally appeared before me John M. Westcott, one of the complainants in the foregoing cause, who, being duly sworn, deposes and says, on behalf of himself and his co-complainant, that he has read the foregoing bill of complaint subscribed by him, and that the statements therein contained are true, excepting as to matters therein stated on information and belief, and as to those he believes the same to be true.

JOHN M. WESTCOTT.

Sworn to before me and subscribed in my presence by J. M. Westcott this 6th day of March, 1876.

[SEAL.] A. P. L. COCHRAN,
United States Commissioner, Southern District of Ohio.

And thereupon there issued out of the office of the clerk of said court a subpœna in chancery in the above-entitled cause in the words following, to wit:

UNITED STATES OF AMERICA, } *ss:*
District of Indiana, }

The President of the United States of America to the marshal of the district of Indiana, Greeting:

12 You are hereby commanded to summon Squire Rude, George Rude, and John Rude (Liberty), citizens of and residents in the State of Indiana, if they be found in your district, to be and appear in the circuit court of the United States for the district of Indiana aforesaid, at Indianapolis, on the first Monday in May next, to answer a certain bill in chancery filed and exhibited in said court against them by John M. Westcott, citizen and resident of Indiana, and Charles W. West, citizen of and resident in the State of Ohio. Hereof they are not to fail under the penalty of the law thence ensuing, and have you then and there this writ.

Witness the Honorable Morrison R. Waite, Chief Justice of the United States, this 10th day of March, 1876, and in the 100th year of the Independence of the United States of America.

Attest:

[SEAL.] J. D. HOWLAND, *Clerk.*

MEMORANDUM.—The said defendants are required to enter their appearance in this suit in the clerk's office of said court on or before the first Monday of May, 1876; otherwise the said bill may be taken *pro confesso.*

J. D. HOWLAND, *Clerk.*

And afterwards, to wit, on the 27th day of April, 1876, said subpœna in chancery was returned into said clerk's office, with the following return endorsed thereon, to wit:

DISTRICT OF INDIANA:

13 I received this writ at Indianapolis, in said district, at — o'clock —. m. on the — day of ——, A. D. 187–. and served the same in Liberty, Union county, as follows: On the 25th day of April, 1876, by copy left at the last usual place of residence of Squire Rude, and on same day I served by reading to and copies left with George Rude and John Rude.

BEN. J. SPOONER, *U. S. Marshal,*
By LEE BURDICK, *Deputy.*

And afterwards, to wit, at the November term of said court, on the 1st day of May, 1876, before the Honorable Walter Q. Gresham, one of the judges of said court, the following further proceedings in the above-entitled cause were had, to wit:

Come now the defendants, by J. W. Conway, Esq., their solicitor, and enter their appearance herein.

And afterwards, to wit, at the May term of said court, on the 5th day of June, 1876, before the Honorable Thomas Drummond and Honorable Walter Q. Gresham, judges of said court, the following further proceedings in the above-entitled cause were had, to wit:

Come now the defendants, by J. W. Conaway, Esq., their solicitor, and file their answer herein, in the words following, to wit:

These defendants, now and at all times hereafter saving and reserving unto themselves all and all manner of benefit and advantage of exception that may be had or taken to the manifold errors, uncertainties, and insufficiencies of the said bill of complaint, for answer thereto or to so much and such parts as they are
14 advised it is material or necessary for them to make answer unto, answering, say:

That they admit the grant and extension of letters patent to said Hiram Moore, as alleged in said bill, but deny, upon information and belief, that he was the original and first inventor of the improvements claimed therein or of any substantial part thereof.

And the defendants further say that they are not advised, save by said bill, whether the alleged assignments were made or not, and have not sufficient information to ground a belief as to the rights of complainants to maintain their said bill; therefore defendants deny the title of complainants and require strict proof, and if it shall appear upon the bringing in of such proof that the complainants have been improperly joined the defendants pray the same benefit from this answer as if they had demurred or pleaded to said bill.

Defendants admit that they have been and are engaged at Liberty, Union county, Indiana, in the manufacture and sale of seeding machines, but deny that such machines infringe either of said letters patent or any rights of the complainants thereunder, and deny that complainants by such sales have been deprived of sales or profits which they would have made from the sales of said patented improvements.

Defendants further deny having manufactured or sold seeding machines except in the manner and at the place hereinbefore stated.

And defendants, having fully answered said bill, by way of
15 further defence, upon information and belief, say that said Hiram Moore was not the first and original inventor of the alleged improvements described and claimed in either of said letters patent, but that prior to the alleged invention thereof the same or substantial and material parts thereof were shown and described in the following letters patent:

English letters patent No. 3943, granted to William Madley, July 27th, 1815.

United States letters patent No. 16636, granted Leonard Arnold, February 17th, 1857; No. 12260, granted to S. L. Stockstill and P. H. Humes, Jan. 16th, 1855; letters patent No. 27865, granted Thomas Lindsey and J. H. Bridler, April 10th, 1860, and reissue No. 5917, being a reissue of letters patent granted to Gilbert Jessup, June 25th, 1861, and that the same had been in public use and on public sale at the following places:

At the shops of H. L. and C. P. Brown and Gilbert Jessup, in Shortsville, Ontario county, New York, known to said Gilbert Jessup and H. L. and C. P. Brown, who now reside at said Shortsville; at the shop of Steven L. Stockstill, near Midway, Clarke county, Ohio, and known to said Stockstill, who now resides near Midway.

At Dayton, Montgomery county, Ohio, and known to G. M. L. McMillan, who now resides at Dayton aforesaid.

At Lincoln, in the State of Illinois, by Thomas Lindsey and J.
H. Bridler and by three licensees and customers, the names and
residences of and the places of use being unknown to these
16 defendants, a full disclosure of which they crave leave to state
as soon as they are advised of the facts of such sale and use.

Defendants, for further answer, say that the sixth claim of complainants' letters patent No. 31819, dated March 26th, 1861, is void, because the same is substantially anticipated by letters patent of complainant No. 30685, dated Nov. 20th, 1860.

Defendants further say that none of the devices patented by said Moore which defendants are charged with infringing in view of the pre-existing state of the art did involve the exercise of invention or such a discovery as in law constitutes a new and useful improvement; that said patents were improperly granted and are therefore void, which will more fully appear by reference to the uses and patents before referred to, together with the letters patent No. 28051, granted William C. Banks, May 1st, 1860; letters patent No. 25513, granted L. L. Lancaster, Sept. 20th, 1859, and also by the public sale and use of seeding machines before the date of the alleged invention of said Hiram Moore by William Horning at his place of residence, Montgomery county, State of Ohio.

These defendants, for further answer, say that the several claims of the patents referred to in complainants' bill are void, because the claims are broader than the invention of Hiram Moore, embracing features that were already known and used prior to his alleged invention.

Defendants further say that the complainants have not nor
17 has either of them made for sale seeding machines embrac-
ing the features claimed in said patents or either of them;
and, further, that said features are worthless for the purpose for which they were designed.

Defendants further say that the feeding machines manufactured by them have been made in accordance with and under authority of letters patent and without any intention to violate any right of complainants, but on the invention of J. R. Rude, S. B. Rude, and G. W. Rude, who secured letters patent therefor Oct. 5th, 1869, and of J. R. Rude, who obtained letters patent therefor April 27th, 1869.

Wherefore these defendants say that the complainants are not entitled to an injunction nor to an account or any other relief against these defendants, as prayed for in their bill of complaint, without this, that any other cause, matter, or thing in the said bill of complaint material or necessary for these defendants to make answer unto is true, to the knowledge or belief of these defendants; all which matters and things these defendants are willing to aver, maintain, and prove as this honorable court shall direct, and humbly pray to be hence dismissed with their reasonable costs in this behalf most wrongfully sustained.

S. B. RUDE.
G. W. RUDE.
J. R. RUDE.

J. W. CONAWAY,
Solicitor and of Counsel for Respondents.

STATE OF INDIANA,
County of Union, } *ss:*

18 Personally appeared before the undersigned authority Squire B. Rude, George W. Rude, and John R. Rude, the above-named defendants, who, being by me duly sworn, depose and say that they have read the foregoing answer subscribed by them, and that the same is true of their own knowledge, except as to the matters therein stated on information and belief, and as to these matters they believe it to be true.

Witness my hand and notarial seal this 3d day of June, 1876.

[SEAL.] J. W. CONAWAY,
Notary Public.

And afterwards, to wit, at the May term of said court, on the 30th day of June, 1876, before the Honorable Walter Q. Gresham, one of the judges of said court, the following further proceedings in the above-entitled cause were had, to wit:

Come now the complainants, by counsel, and file their replication herein in the words following, to wit:

The repliants, saving and reserving unto themselves all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto say that they will aver and prove their said bill to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendants is uncertain, untrue, and insufficient to be replied unto by these repliants, without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law
19 to be replied unto, confessed and avoided, traversed or denied,
is true; all which matters and things these repliants are and will be ready to aver and prove as this honorable court shall direct, and humbly pray as in and by their said bill they have already prayed.

BOWMAN, PRINGLE AND SCOTT,
Complainants' Solicitors.

And afterwards, to wit, at the same term of said court, on the same day, before the Honorable Walter Q. Gresham, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

On motion of the complainants it is ordered that Herman Merritt, of Cincinnati, Ohio, be, and he is hereby, appointed special examiner in this cause, under the 67th amended rule in equity.

And afterwards, to wit, at the November term of said court, on the 17th day of November, 1876, before the Honorable Walter Q. Gresham, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Come now the parties by counsel, and, upon motion, it is ordered that the above-entitled cause be, and the same is hereby, referred to John D. Howland, Esq., master in chancery, who is directed to take the testimony and report the same, together with his finding thereon, to this court with all convenient speed.

And afterwards, to wit, at the May term of said court, on the 14th
day of May, 1880, before the Honorable Walter Q. Gresham,
20 judge as aforesaid, the following further proceedings in the
above-entitled cause were had, to wit:

Come now the complainants, by S. A. Bowman, Esq., their solicitor, and, upon his motion, it is ordered that William Schlater, Esq., of the city of Richmond, State of Indiana, be, and he is hereby, appointed special examiner in chancery in the above-entitled cause, and is empowered to cause to come before him, at the office of H. C. Fox, Main street, in the said city of Richmond, upon proper notice given to the defendants, the witnesses of the complainants, and to take their depositions in writing and return the same, duly certified, into this court, addressed to the clerk thereof, at Indianapolis.

And afterwards, to wit, at the May term of said court, on the 1st day of November, 1880, before the Honorable Walter Q. Gresham, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Come now the defendants, by Hatch and Stem, their solicitors, and enter their appearances herein.

And afterwards, to wit, at the November term of said court, on the 3d day of December, 1880, before the Honorable Walter Q. Gresham, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

On motion of defendants it is hereby ordered that Jeremiah Twohig, of Cincinnati, Ohio, be appointed special examiner for the State of Ohio, for the purpose of taking testimony on behalf of defendants in the above-entitled cause, under the 67th rule in equity as amended.

21 And afterwards, to wit, at the November term of said court,
on the 21st day of February, 1880, in recess thereof, the fol-

lowing further proceedings in the above-entitled cause were had, to wit:

Come now the defendants, by Stem and Peck, their solicitors, and enter their appearance herein.

And afterwards, to wit, at the November term of said court, on the 25th day of February, 1881, before the Honorable Walter Q. Gresham, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

The motion of the defendants to dismiss the bill (1) for want of parties complainant and (2) for want of prosecution having been argued by counsel for both sides, and the court being fully advised in the premises, said motion is overruled without prejudice to the defendants to renew the objection of a want of parties on a final hearing.

And afterwards, to wit, at the November term of said court, on the 28th day of February, 1881, before the Honorable Walter Q. Gresham, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Come now the defendants, by Stem and Peck, and file motion for leave to amend answer and to extend time for taking testimony herein in the words following, to wit:

Now come the defendants herein and move the court for leave to amend their answer herein, and also for such time as the court may deem reasonable in which to take further testimony.

22 And afterwards, to wit, at the November term of said court, on the 2nd day of March, 1881, before the Honorable Walter Q. Gresham, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Come now the defendants, by Stem and Peck, their solicitors, and by consent file answer herein in the words following, to wit:

Now come the defendants and amend their answer herein by adding thereto the following:

These defendants, further answering, deny the title of the complainants to this suit, and allege that these complainants have not such title to the letters patent mentioned in their bill of complaint as to enable them to bring suit thereunder against these defendants.

These defendants further allege that on the 10th day of November, 1874, the said John M. Westcott, by an instrument in writing bearing said date, assigned and sold to Isaac Kinsey and Aaron Morris a certain undivided part of the interest in the letters patent sued on herein, which said assignment is recorded in the Patent Office of the United States.

And these defendants further allege that on the 4th day of February, 1879, the said Isaac Kinsey assigned an undivided one-twelfth interest in said letters patent to Lowell L. Laurence and the Wayne Agricultural Company; which said assignment is now of record in the Patent Office of the United States.

23 Wherefore these defendants again allege the want of suffi-

cient title in the complainants to enable them to maintain this suit, and they pray as they have heretofore prayed.

GEORGE W. RUDE.
JOHN R. RUDE.
SQUIRE B. RUDE.

STEM AND PECK,
Sol'rs for Def'ts.

STATE OF INDIANA,
County of Union, } *ss:*

Squire Rude, George Rude, and John Rude, the defendants in the above-entitled cause, being first duly sworn, depose and say that the matters mentioned in the foregoing amended answer are true, to the best of their knowledge and belief.

GEORGE W. RUDE.
JOHN R. RUDE.
SQUIRE B. RUDE.

Subscribed and sworn to before me this 1st day of March, 1881.

[SEAL.] L. W. STANFORD,
Notary Public.

And afterwards, to wit, at the November term of said court, on the 11th day of March, 1881, before the Honorable Walter Q. Gresham, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Come the parties, by counsel, and thereupon the court, being sufficiently advised in the premises, doth now overrule the motion of the defendants to extend the time for taking testimony herein.

24 And afterwards, to wit, at the November term of said court, on the 16th day of March, 1881, before the Honorable Walter Q. Gresham, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Upon motion of defendants in the above-entitled cause for leave to take further testimony, and said defendants having offered a bond in the sum of $5,000 as security for costs and damages, which bond is accepted and approved, it is ordered that the defendants have twenty days from the 16th day of March, 1881, in which to take such testimony as they may desire, and that the complainants may have fifteen days thereafter in which to take rebutting testimony.

It is further ordered that the orders heretofore entered overruling said motion be set aside.

And afterwards, to wit, at the May term of said court, on the 16th day of May, 1881, before the Honorable Walter Q. Gresham, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

This cause having been brought to a final hearing upon the pleadings and proofs, and counsel for the respective parties having

been heard and the same having been duly considered by the court, it is found, and hereby ordered, adjudged, and decreed, that the extended letters patent No. 30685, dated November 20th, 1860, and No. 31819, dated March 26th, 1861,
25 granted to Hiram Moore for improvements in seeding machines and set out in the bill of complaint herein, are good and valid; that the said Hiram Moore was the original and first inventor of the improvements specified in each of said patents; that said improvements are useful, and that the title to said letters patent, respectively, is duly vested in the complainants.

And it is further ordered, adjudged, and decreed that the defendants have disturbed, violated, and infringed the exclusive rights of the complainants under the said letters patent, as in said bill set forth.

And it is further ordered, adjudged, and decreed that the complainants do recover of the defendants the profits, gains, and advantages which the defendants or any or either of them have received or made or which have arisen or accrued to them or either of them from their said infringement of said patents or either of them by the manufacture, use, or sale of the improvements specified in the first and second claims of said patent No. 30685 or in the sixth claim of said patent No. 31819, up to the expiration thereof, together with the damages the complainants or the said Moore have sustained thereby.

And it is further ordered, adjudged, and decreed that the complainants do recover of the defendants their costs, charges, and disbursements in this suit to be taxed.

And it is further ordered, adjudged, and decreed that it be referred to William P. Fishback, Esq., one of the masters of this court, residing at Indianapolis, to ascertain, take, and state and report
26 to the court an account of the gains, profits, and advantages which the defendants or either of them have received or which have arisen or accrued to them or either of them from infringing the said claims of said patents or either of them, as well as the damages the complainants or the said Moore have sustained thereby.

And it is further ordered, adjudged, and decreed that the complainants, on such accounting, have a right to cause an examination of said defendants and each of them, *ore tenus* or otherwise, and also the production of their books, vouchers, and documents, and that the defendants attend for such purpose before said master from time to time as said master shall direct.

And it is further ordered, adjudged, and decreed that a perpetual injunction be issued in this suit against the defendants to restrain them and each of them, their agents, employees, and servants, from making, using, or vending the improvements specified in the first or second claims of said patent No. 3685 and in the sixth claim of patent No. 31819, pursuant to the prayer of the bill.

And afterwards, to wit, at the May term of said court, on the 23d day of May, 1881, before the Honorable Walter Q. Gresham, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Whereas on the 16th day of this month a decree was entered 27 in this cause providing, among other things, for a perpetual injunction against said defendants, their agents, employees, and servants; and whereas by inadvertence said decree of injunction was made to apply to the "sixth claim of patent No. 31819," which had at that time expired: Now, therefore, it is ordered by the court that that part of said decree be so modified as not to apply to the sixth claim of patent No. 31819, but that said decree in all other respects remain as there entered; and this modification shall not affect the complainants' right to damages for the infringement of sixth claim of patent No. 31819 prior to the expiration of said patent.

And afterwards, to wit, at the May term of said court, on the 30th day of May, 1881, before the Honorable Walter Q. Gresham, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

And now, at this day, come as well the said complainants as the said defendants, by their counsel, respectively, and, it appearing to the satisfaction of the court that since the decree was entered herein on the 17th day of May, 1881, enjoining the defendants from further infringement of the complainants' patent, the complainants have published printed circulars warning the public that said decree had enjoined the defendants, their agents, employés, and servants, from making, using, or vending the machines known as the "Indiana" or "Improved Indiana;" and it further appearing that the 28 publication of said printed circulars tends to injure the defendants' business as manufacturer of grain drills, and that said circular is an unwarranted interpretation of said decree, it is ordered and adjudged by the court that the said complainants, their attorneys, agents, and servants, be, and they are hereby, enjoined from further publication or use of said circular, either as advertisements in newspapers or by transmission through the mails or otherwise; and the said complainants, their attorneys and agents, are further enjoined from commencing or prosecuting any suit or suits in any other court or courts against the defendants herein, their agents or servants, for the manufacture, sale, or use of any machines which are the subject of account before the master in this suit, and the costs of this motion will be taxed against the complainants.

And afterwards, to wit, at the November term of said court, on the 19th day of December, 1881, before the Honorable Walter Q. Gresham, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Come now the complainants, by H. C. Fox, their solicitor, and upon his motion it is ordered that Thomas D. Evans, of the town of Silsby, Union county, Indiana, be, and he is hereby, appointed special examiner in chancery in this cause, and is empowered to cause to come before him, at his office in said town of Silsby, upon proper notice given to the defendants, the witnesses of the complainants and to take their depositions in writing and return the same duly certified into this court, addressed to the clerk thereof, at Indianapolis.

29 And afterwards, to wit, at the November term of said court, on the 29th day of March, 1882, before the Honorable Walter Q. Gresham, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Come now the complainants, by Henry C. Fox, solicitor, and upon his motion it is ordered that George Needham, of the city of Richmond, Indiana, be, and he is hereby, appointed special examiner in chancery in this cause, and is empowered to cause to come before him, at his office, No. 510 Main street, in the city of Richmond, Wayne county, State of Indiana, upon proper notice given to the defendants, the witnesses of the defendants, and to take their depositions in writing, and return the same duly certified into this court, addressed to the clerk thereof, at Indianapolis.

And afterwards, to wit, at the November term of said court, on the 27th day of November, 1882, before the Honorable Walter Q. Gresham, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

On motion before me for a rule upon the defendants *do* appear and show cause why they should not be attached for contempt of court in the violation of the decree herein perpetually enjoining them from the further infringement of the letters patent therein mentioned, and being satisfied, upon the evidence submitted to me, that there is cause for issuing said rule, it is hereby ordered that said defendants, Squire B. Rude, George W. Rude, and John R. 30 Rude, appear before said court, at the hour of 10 o'clock in the morning, on Monday, the 8th day of January, 1883, or as soon thereafter as counsel can be heard, then and there to show cause, if any they can, why an attachment as for contempt should not issue against them for making, selling, and delivery at liberty, within said district, grain-seeding machines, such as they were, by the decree and injunction of this court, perpetually enjoined from making, selling, or delivering.

And afterwards, to wit, at the November term of said court, on the 8th day of January, 1883, before the Honorable Walter Q. Gresham, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

This cause coming on to be heard on a rule to show cause why the defendants should not be attached for contempt of court for an alleged violation of the injunction, and the same having been argued by counsel for the respective parties, the court, being fully advised in the premises, doth hereby order, adjudge, and decree that the defendants had not violated the injunction, and that said rule be dismissed at complainants' costs.

And afterwards, to wit, at the November term of said court, on the 6th day of December, 1883, before the Honorable William A. Woods, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

31 Comes now William P. Fishback, Esq., master in chancery, and files his report and evidence herein; and said report is in the words following, to wit:

[In pencil:] This report was withdrawn & case recommitted to master.

32 And afterwards, to wit, at the November term of said court, on the 14th day of December, 1883, before the Honorable William A. Woods, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Come now the defendants, by Mess. Stem and Peck, their solicitors, and file their exceptions to the master's report herein in the words following, to wit:

Exceptions taken by defendants to the report made in the above-entitled cause by W. P. Fishback, special master, to whom this cause was referred by an order of this court made in the interlocutory decree herein, and being the report filed December 6th, 1883.

Now come defendants herein and except to the said report of said master for reasons as follows, to wit:

First. For that said report fails to find, as it should find, that the testimony offered by complainants is indefinite and uncertain and that no certain number of infringing machines made by defendants can be arrived at with accuracy or certainty; therefore only nominal damages can be recovered.

Second. For that said report fails to find, as it should find, that the testimony referring to a statement in writing, made by defendants pending this litigation, relating to the number of drills made by defendants is incompetent and should be excluded from the record because said statement was made as part of negotiations for a compromise and contained all drills made by defendants, many of which did not infringe complainants' patents. 33

Third. For that said report fails to find, as it should find, that said statement contained the total number of machines made by defendants, both those infringing and those not infringing the patents sued on, and therefore is not proof of the number of infringing machines made by defendants.

Fourth. For that said report erroneously finds that defendants have made and sold 1,600 drills infringing complainants' patents—800 two-horse drills and 800 one-horse drills—whereas it should have found that the evidence was so indefinite and uncertain that no exact number of infringing drills can be found with certainty or accuracy, and nominal damages only can be recovered.

Fifth. For that said report erroneously finds that most of the drills made by defendants infringed two claims of complainants' patent, whereas it should have found that the evidence shows that only a small number infringed two claims of one patent and none of the claims of the other patent.

Sixth. For that said report erroneously finds that defendants' conduct manifests a disposition to conceal the facts or such an ignorance on the subject that their evidence, outside of admission against their own interest, is entitled to little weight, whereas said re-
34 port should have found, as the fact is, that defendants' books were burned and they were unable to give an exact statement of the facts, but did all that could be reasonably required of them to get at the facts in the case, and furthermore that the burden of proof was on complainants to show accurately and exactly the number of infringing drills made and sold by defendants; that complainants have failed in such proof and must recover nominal damages only.

Seventh. For that said report erroneously finds that the evidence of Mr. Ham "shows that the statement of defendants was not so large," and the evidence of Mr. Reinstedler "supports the truth of the statement," whereas it should have found, as is the fact, that Mr. Ham's statement covers all drills made or sold by defendant with the exception of not more than 10 or 15; that said statement covers at least four different kinds of drills, and that Mr. Ham had no knowledge whether one or all or any of these drills infringed any of complainants' claims, and that Mr. Reinstedler never knew how many of defendants' drills sold by him infringed complainants' patents, and never noticed when they were altered, and that from said evidence it is impossible to arrive at any accurate estimate of the number of infringing drills made by defendants.

Eighth. For that said report erroneously finds that defendants should pay the damages reported on all machines made by them infringing any of complainants' claims, whereas it should
35 have found, as is the fact, that complainants never made any machines and marked them patented or gave actual notice of their patents to defendants prior to the filing of this suit in 1876, and are therefore barred by statute from recovering any damages.

Ninth. For that said report erroneously finds that complainants' evidence proves an established license fee which may be taken as a basis of damages, whereas it should have found, as is the fact, that the evidence fails entirely to prove an established license fee which can be taken as a basis of damages, and that the complainants are only entitled to recover nominal damages.

Tenth. For that said report erroneously finds that the evidence proves that the "Wayne Agricultural Company paid the royalty of $1.00 for one-horse drills and $2.00 for two-horse drills for four years, which, in the absence of evidence to the contrary, may be regarded as reasonable," whereas it should have been found, as is the fact, that the evidence proves that the Wayne Agricultural Company paid a royalty of fifty cents for one-horse machines and $1.00 for two-horse machines for four years, but then refused to pay it any longer, and that the question of the amount of royalty was then submitted to arbitration by the parties; that such payments or any payments by the Wayne Agricultural Company under the circumstances cannot be held to be proof of an established license fee.

36 Eleventh. For that said report erroneously finds that the settlement made by complainants with P. P. Mast was on the basis of an established royalty of $1.00 for one-horse and $2.00 for two-horse machines, and that the fear of litigation was a small element of the settlement itself, whereas it should have found that the evidence proves that the settlement with Mast was not made upon a basis of said license fee, but a lump settlement made to avoid litigation for past infringements, no estimate being made of the number of machines made and sold or at the time during which said patent had been infringed, and that said settlement does not prove an established license fee for the use of complainants' patent, but, on the contrary, proves that there was no market value for such a license and no fixed or estimated royalty.

Twelfth. For that said report fails to find, as it should find, that the testimony shows that the settlement with English and Over was made in fear of suit; that other considerations than the value of complainants' patents entered as an element of the settlement, viz., the fear that unless settlement was made the Hoosier Drill Company would cease paying English and Over their license fee; that English and Over never took any license, and that Over succeeded to the assets and liabilities of the firm of English and Over, and for five years continued to infringe the patents and never paid any license fee.

37 Thirteenth. For that said report fails to find, as it should find, that the burden of proof of an established royalty is on the complainants, and that said complainants have only proven one license, which was abandoned by the parties, and the amount of royalty to be paid submitted to arbitration; that complainants' evidence that a license was taken by Mast and English and Over is contradicted by Mast and English and Over, and, as it stands, the complainants have failed to prove an established royalty.

Fourteenth. For that said report erroneously finds that the evidence proves that there was an established license fee, and that said fee was the same if one or all of the ten claims of the two patents were infringed, whereas it should have found, as is the fact, that even if defendants had proven an established license fee, which they have not, they have still failed to prove that defendants infringed more than two of the ten claims, and have failed to prove any established royalty for said two claims separate from the whole ten; hence they have failed to prove any proper measure of damages for defendants' infringement, and any recovery must be only nominal.

38 Fifteenth. For that said report erroneously finds that defendants have made and sold 800 infringing one-horse machines, and that the plaintiffs' damage on that account is $800, and that defendants have made and sold 800 infringing two-horse machines, and that plaintiffs' damages on that account are $1,600, making $2,400 his damages in full, whereas said report should have found, as is the fact, that the complainants have failed to prove definitely any number of infringing machines made and sold by defendants; that complainants have failed to prove any fixed or established license fee, and have taken no testimony to prove any profits;

therefore, there being no evidence upon which any report of damages can be based, the report must be for nominal damages, with the costs of the account, for defendants.

Sixteenth. For that said report and finding is based on guesswork and speculation and not, as required by law, on clear and specific evidence proving positively and accurately the measure and amount of damages, there being no such proof before the master.

Respectfully submitted, STEM AND PECK,
Counsel for Def'ts.

And afterwards, to wit, at the November term of said court, on the 1st day of April, 1884, before the Honorable William A. Woods, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

This cause coming on to be heard on the exceptions of the defendants to the master's report, and being argued by counsel and considered by the court, and the court being duly advised in the premises, is of the opinion that the proof does not sustain the finding of the master as to the matter of damages; and it is thereupon ordered by the court that this cause be, and the same 39 is hereby, recommitted to the master with directions to admit further evidence as to damages and to report the same with his conclusions of law with all convenient speed.

And afterwards, to wit, at the November term of said court, on the 23rd day of April, 1885, before the Honorable William A. Woods, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Comes now William P. Fishback, Esq., master in chancery, and files his 2nd report herein in the words following, to wit:

To the honorable court:

The undersigned, the master in chancery to whom this cause was referred to take additional evidence concerning plaintiffs' claim for damages herein and report the same to the court with his conclusions, now respectfully reports as follows:

The evidence taken and submitted to me, in addition to the items of evidence filed with and covered by my former report, consists of the following, viz:

The deposition of John M. Westcott, taken by Robert Zahnor, notary public, January 14th, 1885, with exhibits.

Copy of letters patent or specification forming part of letters patent No. 30685, to Hiram Moore, dated November 20th, 1860.

Drawings of Flory and Grove grain drill, No. 7163, patented March 12th, 1850.

40 Drawings of A. Franklin seeding machine, No. 18579, patented November 10th, 1857.

Also specifications forming parts of said two letters patent to Flory and Grove and A. Franklin.

Stipulation, dated February 10th, 1885, stating what William H. Nauman would testify as a witness if he were sworn and examined as such.

Deposition of Horace G. Swope, taken and certified by Thomas D. Evans, notary public and special commissioner, February 6th, 1885.

Depositions of James A. Marley and Charles E. Patric, taken and certified by James Johnson, notary public, January 8th, 1885.

Depositions of L. L. Lawrence and Jesse P. Fulgham, taken and certified by Perry J. Freeman, notary public.

Depositions of William H. Lefevre, Henry B. Thompson, John H. Shearer, taken and certified by George O. Warrington, notary public, January 5th, 1885.

Also the exhibits used and referred to in the examination of said witnesses.

Also said evidence and exhibits, with briefs of counsel, are filed herewith.

The additional evidence does not strengthen the proofs heretofore made in support of the claim that complainants had established a license fee or royalty which furnished a criterion upon which to estimate *his* damages. The effort has been to prove that the device or combination covered by the first claim of the patent No. 30685 was an invention of great value and utility, and that complainants are entitled to damages for the infringement thereof by defendants.

41 The claim is described and set forth as follows in the specifications forming part of said letters patent No. 30685:

"The conduit or passage 'H,' arranged between the bottom of the hopper and the discharge, in combination with the oblique discharge I and the toothed distributing cylinder 'C,' substantially as described, and for the purposes herein specified."

The specification says: "This conduit 'H' passes beyond the lowest point of the cylinder, and then curves or inclines slightly upward, so that the grain cannot fall out from the conduit by gravitation, but must be moved, as it were, uphill before it can reach the discharging orifice," etc.

The first inquiry is as to the number of grain drills made and sold by defendants which infringed the claim above set out. On this branch of the case no new evidence has been produced, and, as was stated in the former report, it is impossible to reach a satisfactory result. George Rude and Squire Rude, the defendants, differ very materially in their evidence on this point. Taking the outside figures given by George Rude, and it might conclude that from 1870 to 1881, both inclusive, the firm of Rude Bros. made and put on the market 2,500 grain drills which infringed the claim mentioned. By Squire Rude's evidence the number would not exceed 1,500. The evidence of Ham, the railroad agent at Liberty, where the drills were put on the cars, and of Rhinestedler, the agent of defendants, who sold their drills at St. Louis and in the West, 42 is unsatisfactory for the reason that they are unable to state how many of the drills handled by them were infringing machines.

Besides this it appears that some of the so-called infringing machines did not use all the elements of the combination described under the first claim above mentioned. In some of them the "oblique" discharge I was not used, but what is called a "straight" discharge was substituted therefor.

To this it is answered that the "straight discharge" is the mechanical or practical equivalent of the "oblique discharge," and that the use of the conduit H and the toothed cylinder "C" in combination with the "straight discharge" is as much an infringement of complainants' claim as if the "oblique discharge" were used.

The merit claimed for the oblique discharge was that the grain was delivered from the discharge orifice in a steady flow, while the straight discharge would deliver it in bunches. Theoretically this seems to be so, but practically, and as shown by the tests made in the master's office and the experiments testified to by the witnesses, there seems to be very little, if any, difference in this respect.

The chief value of plaintiffs' combination is in the channel or conduit H, which is so constructed that a reservoir of loose grain is collected in the bottom of the seed cup, into which it falls from the hopper without obstruction, and from there it is lifted by the 43 toothed cylinder to the discharge orifice, where the grain is discharged without being cracked or injured. In the "gravitation feeds," in use prior to the complainants' invention, the revolving cylinder was fitted so closely to the inside of the cup that the grain was cracked or injured in passing. The complainants' device is for a "force feed," which lifts the grain to an elevated discharge orifice, as distinguished from a gravitation feed, in which the grain passes from the hopper to the discharge orifice at the bottom of the cup, where it drops to the ground. The force feed has an elevated discharge orifice to which the grain is lifted; the gravitation feed has a discharge orifice at the botton of the cup, and the grain is released without being lifted.

But the claim covers the combination consisting of the conduit or channel, the toothed cylinder, and the oblique discharge, and the evidence shows that a number of the machines made and sold by defendants had the two first-named elements of the combination, but had the straight instead of the oblique discharge.

Squire Rude, one of the defendants, testifies that they made a change in the cup in 1880 or 1881, cutting the mouth of the feed cup square. (See deposition June 29th, 1883, answer to question 3.)

He says, in answer to question 12, same deposition, that he thinks the changes were made in 1880. He says, in answer to cross-question 18, same deposition, that it was made in March or April, 1881.

44 It appears by George Rude's evidence that during the years 1870, 1874, 1875, 1878, 1879, 1880, and in 1881 (prior to May) defendants made and put on the market about 2,000 drills; *of* his outside figures were adopted the number would be larger. Squire Rude makes the number less. In my former report I used George Rude's evidence as to the contents of a written statement he had made for a basis upon which to estimate the number of infringing machines. His depositions, outside of what he says about the written statement, shows a greater number than I then reported. I now report and find that the whole number made and sold by defendants

which infringed all three of the elements of the combination covered by the first claim was 2,000, and that of these one-half were one-horse and one-half two-horse drills. The burning of defendants' factory and the loss of their books have made it impossible to get at the exact number.

There remains to be considered the question of the value of this claim or combination to the defendants who used it in violation of complainants' rights. The evidence on this subject is conflicting. During the life of the patent some manufacturers considered it of so much value that they paid a stipulated license for its use. Now they say it is worth very little, if anything, and it may be true that its value has been impaired or destroyed by new devices and improvements. The value of this combination, as estimated by
45 the witnesses, varies from nothing to six dollars per drill. In the highest estimates the witnesses must refer to the increased value to the farmer who uses the machine. The manufacturer expects to make a profit, and it would not be fair to charge him the value of the combination in that sense.

I report and find that the complainants are entitled to damages as follows:

For 1,000 one-horse drills at 75 cents each	$750 00
" " two " " " $1.50	1,500 00
Total damages	$2,250 00

Respectfully submitted, W. P. FISHBACK.

And afterwards, to wit, at the November term of said court, on the 29th day of April, 1885, before the Honorable William A. Woods, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Come now the defendants, by Stem and Peck, their solicitors, and file their exceptions to the master's report herein in the words following, to wit:

Exceptions taken by defendants to the report of W. P. Fishback, special master, to whom this cause was referred by an order of this court made in the interlocutory decree herein, and being the second report of said master herein, and filed April 23d, 1885.

Now come defendants herein and except to the said report by said master for reasons as follows, to wit:

46 First. For that the findings in said report are based on speculation and are only guesses, both as to the number of infringing drills and as to the value of the claim infringed.

Second. For that the said report fails to state, as it should state, any definite facts or evidence as a basis or ground for the findings reported.

Third. For that said report erroneously finds that defendants made and sold two thousand grain drills which contained the combination described in the first claim of said patent No. 30685, whereas it should have found that defendants made and sold a much smaller number of drills which contained said combination.

Fourth. For that said report finds that said defendants made and sold an equal number of one-horse and two-horse drills containing complainants' invention, whereas it should have found that the evidence shows that the number of one-horse and the number of two-horse drills containing complainants' invention was not the same.

Fifth. For that said report erroneously finds that the chief value of the combination claimed in said patent consists in the channel H, which is so constructed that a reservoir of loose grain is collected at the bottom of the seed cup, into which it falls from the hopper without obstruction and from which it is lifted by the toothed cylinder to the discharge orifice without being injured or cracked, 47 and that in seeding machines in use prior to complainants' invention the seed wheel was fitted so closely to the inside of the cup that the grain was cracked or injured—that is, that its value consists in that it permits the grain to pass from the hopper to the ground without being broken or injured, which was not done by devices used prior to complainants' invention—

Whereas said report should have found from the evidence that the value of the channel H in complainants' combination consists in the fact that said channel, by providing a reservoir at the bottom of the cup, retains the grain in the cup until it is lifted out by the toothed cylinder, thereby preventing it from falling out by gravity, thus making it a force feed; that grain drills in use prior to complainants' invention permitted the grain to pass from the hopper through the cup and fall to the ground by gravity, but that in both the force feeds and gravity feeds a channel is provided, through which the grain passes uninjured.

Sixth. For that said report fails to find, as it should find, that the first claim of patent No. 30685 is for a combination of three separate elements, and a drill using less than all of these elements does not infringe said claim; that one of these elements is an oblique discharge orifice; that a large portion of defendants' drills omitted this element, and therefore did not infringe the combination claimed.

48 Seventh. For that the said report fails to find that the witnesses who testify to the value of the combination claimed base their opinions and conclusions upon two false or mistaken assumptions of fact, and that their testimony is therefore valueless and their conclusions false, said false or mistaken assumptions being, first, that the witnesses base the value of one element of the combination claimed in the patent, viz., the channel H, upon the fact that it permits the grain to pass from the hopper to the ground without being cracked or injured, assuming that the claim of the patent covers any channel which permits the grain to pass through the cup uninjured, whereas any passage back of and under the toothed cylinder, such as those used in gravity feeds long prior to complainants' invention, would permit the grain to pass without being broken or injured as completely as would the passage H; and, second, in

that the witnesses, in estimating the value of the second element of the combination, viz., the oblique discharge, base their opinions and conclusions upon the assumption that an oblique discharge is necessary to cause the grain to flow in a stream instead of bunches; whereas, as a matter of fact, such oblique discharge is not necessary, but the grain will not bunch when a straight discharge is used, but will flow as evenly as with the oblique discharge.

Eighth. For that said report erroneously finds that the damages suffered by complainants by reason of defendants' infringe-
49 ment of a single claim to be greater than the amount the
complainant-, after full consideration and consultation, offered to charge for a license to use the entire ten claims of the two patents sued on.

Respectfully submitted,

STEM AND PECK,
Counsel for Defendants.

CINCINNATI, *April 28th*, 1885.

And afterwards, to wit, at the May term of said court, on the 19th day of June, 1885, before the Honorable Walter Q. Gresham and Honorable William A. Woods, judges of said court, the following further proceedings in the above-entitled cause were had, to wit:

Come now the complainants, by Mess. Wood & Boyd, their solicitors, and file their bill of revivor in the above-entitled cause in the words following, to wit:

John M. Westcott, of Richmond, in said State of Indiana; Henry Lewis, Edward A. Furgeson, of Cincinnati, State of Ohio, and citizens of Ohio, and John T. West, of the city of Minneapolis, State of Minnesota, and a citizen of Minnesota, executors of the last will and testament of Charles W. West, deceased, bring this their bill of revivor against Henry Husted and Americus E. Johnson, administrators of the estate of George W. Rude, deceased, and William M. Snyder, executor under the last will and testament of John R. Rude, deceased.

And thereupon your orators show unto your honors that
50 said John M. Westcott and Charles W. West did, on or about
the tenth day of March, 1876, exhibit their original bill of complaint in this court against Squire B. Rude, George W. Rude, and John R. Rude, of Liberty, in the State of Indiana, praying for an account, payment of profits and damages, and an injunction to restrain them from infringing letters patent granted to Hiram Moore for improvements in grain drills, and by him assigned to said Westcott and West.

And your orators further show unto your honors that the said defendants, having been duly served with process for that purpose, appeared and put in their answer to said bill, and such proceedings were had on or about the sixteenth day of May, 1881, that upon a hearing upon pleadings and proofs a decree was entered, as prayed for in said bill, and the matter referred to W. P. Fishback, one of the masters of this court, to ascertain and report the damages, as will more fully appear by the record of this case.

And your orators further show that proceedings have been had before said master and that his report is now on file.

And your orators further show that after the making of said decree said Charles W. West departed this life, having first made and published his last will and testament in writing, whereby he appointed your orators, Henry Lewis, John T. West, and Edward A. Furgeson, executors thereof, and who have since duly probated said will.

51 And your orators further show that since the entry of said decree the said George W. Rude has departed this life and that the said Henry Husted and Americus E. Johnson have been duly appointed administrators of his estate.

And your orators further show that since the entry of the decree herein the said John R. Rude has departed this life, first having made and published his last will and testament in writing and thereby appointed said William M. Snyder executor thereof.

And your orators further show that the said suit and proceedings have become abated by the deaths aforesaid, and that they are, as advised, entitled to have the said suit and proceedings revived against the said Henry Husted, Americus E. Johnson, and Wm. M. Snyder, and to have the said cause put in the same plight and condition as the same was in previous to the abatement thereof by the deaths aforesaid.

To the end, therefore, that the said Henry Husted, Americus E. Johnson, and William M. Snyder may show cause, if they can, why the said suit and proceedings therein should not stand and be revived against them as such executor and administrators as aforesaid of the late defendants, John R. Rude and George W. Rude, and be in the same plight and condition as the same were in at the time of the abatement thereof, and that the said suit and proceedings had therein may stand and be revived accordingly:

May it please your honors to grant unto your orators a writ 52 of subpœna to revive the same, issuing out of and under the seal of this honorable court, to be directed to the said Husted, Johnson, and Snyder, thereby commanding them, by a certain day and under a certain penalty to be therein expressed, to be and appear before your honors in this honorable court, and then and there to show cause, if they can, why the said suit and the proceedings therein should not stand and be revived against them, and be in the same plight and condition as the same were in at the time of the abatement thereof; and, further, to stand to and abide such order and decree in the premises as to your honors may seem meet.

And your orators will ever pray, &c.

WOOD AND BOYD,
Solicitors for Orators.

And afterwards, to wit, at the same term of said court, on the same day, before the Honorable Walter Q. Gresham and Honorable William A. Woods, judges of said court, the following further proceedings in the above-entitled cause were had, to wit:

On motion this day to the court by Mr. Boyd, of counsel for the complainants, and by consent of Mr. Stem, of counsel for defendants, it is ordered that the suit and proceedings mentioned in the bill of revivor herein stand revived in the name of said John M. Westcott and Henry Lewis, John T. West and Edward A. Ferguson, executors of Charles W. West, deceased, against said Squire B. 53 Rude and Henry Husted and Americus E. Johnson, administrators of George W. Rude, deceased, and William M. Snyder, executor of John R. Rude, deceased, and be in the same plight and condition they were in at the time of deaths of said George W. Rude and John R. Rude, two of the defendants in the original bill herein.

And afterwards, to wit, at the May term of said court, on the 3d day of July, 1885, before the Honorable William A. Woods, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

This cause came on to be heard on exception to the master's report, and was argued by counsel; and thereupon, upon consideration thereof, it is ordered, adjudged, and decreed that the complainants do recover of the defendants the sum of eighteen hundred dollars for the damages sustained by them as complained of in the bill, together with their costs to be taxed and a fee of $150 allowed the master, and that execution issue therefor as in an action at law.

And in so far as the master's report is inconsistent with the foregoing order the exceptions to said report are sustained, and in other respects said exceptions are overruled.

And the defendants now pray an appeal, which is granted upon their filing bond in the sum of $5,000, with sureties to be approved by the court.

54 (Here follows the opinion of Judge Woods.)

The exceptions filed are numerous, but passing by others the court will consider only those which bring into question the measure of the damages assessed. Upon this point the master says:

"Plaintiffs waive all claim for profits and rely upon the proofs produced as establishing a fixed license or royalty as the measure of damages." And after giving an abstract of the testimony of the four witnesses who were examined upon the point, the report proceeds to say: "It is very difficult to determine from this evidence whether it makes proof of such an established royalty or license fee as furnishes a criterion upon which to estimate complainants' damages. The owner of a patent is granted a monopoly. He may choose to reserve the right to use his invention exclusively to himself and to make and sell machines, keeping all other manufacturers out of competition. He may enjoin infringers. He has the right to fix a reasonable license fee or royalty, to be paid by manufacturers who use his invention in making machines, and, if fixed and reasonable and paid by those who use the invention, such fee or royalty is a criterion upon which a computation or assessment of damages may be based.

"It is proved that the Wayne Agricultural Company paid
55 the royalty of $1.00 for 1-horse machines and $2 for 2-horse
machines for four years—a sum which, in the absence of evidence to the contrary, may be regarded as reasonable. Mast & Co. paid between $2,000 and $3,000 in cash and conceded privileges, which Westcott estimates to have been worth as much more for infringement. It is true Westcott threatened suit, and when money is paid under threat of suit merely as the price of peace it furnishes no evidence of the amount or value of the real claim in dispute; but the settlement made shows that Westcott was paid something substantial for the infringement, and that the fear of litigation was a small element of the settlement itself. Westcott says that he arrived at the amount by his estimate of the number of the machines made by Mast & Co. and other considerations which are explained in Mast's deposition. Mast says no estimate was made of the number of machines."

"Westcott says he gave licenses like the one attached to his deposition to Mast & Co. and to English and Over. Mast was examined but not interrogated on that point. Mr. English, the active man in the firm of English and Over, says he does not recollect whether they took a license or not."

"It is with considerable reluctance that I have come to the conclusion that the evidence furnishes proof of a license fee which may
be taken as a basis for damages. The defendants have un-
56 doubtedly infringed complainants' invention, and the ma-
chines made by them, which are mentioned in the evidence, were all made after this suit was brought."

As to the point made that the evidence does not show how many of the machines made by defendants infringed one and how many infringed both claims of plaintiff, the master is of the opinion that the terms of the license were the same in either case and the same fee was charged whether one or more claims were infringed. "I therefore report and find that the defendants have made and sold 800 infringing one-horse machines and that plaintiffs' damages on that account are $800, and that defendants have made and sold 800 infringing two-horse machines, and that plaintiffs' damages on that account are $1,600, making $2,400 his damages in full."

The clause in this license referred to by the master is of the following tenor:

Third. The party of the second part agrees to pay two dollars as a license fee upon every two-horse drill or seeder and the sum of one dollar on every one-horse drill or seeder manufactured by said party of the second part containing any of the patented improvements: Provided, That if the said fee be paid upon the days provided herein for semi-annual returns, or within ten days thereafter, a discount of fifty cents shall be made from said fee for prompt payment."

There is probably no reason to question the general principles enunciated by the master in respect to the rights of patentees

57 in their inventions, but the court does not concur in all respects with the master's application of them in this case nor with the conclusion reached. Some of the facts found are not, in the judgment of the court, supported by the evidence. Some items of evidence were considered by the master which, in the opinion of the court, were not admissible, and which, therefore, should have been allowed no weight whatever.

In respect to the royalty paid by the Wayne Agricultural Company, Westcott, the only witness to the point, testified this:

"The licensees to whom these licenses were given paid the fees as stipulated. The Wayne Agricultural Co. paid for four years, since which time they have paid nothing, their excuse being that they claimed to have bought an interest in the patent. We sued them in this court and the court decided that they had no title to the patent, and then they agreed to arbitrate with us and the suit was dismissed."

This evidence does not show the payment of fees as stated by the master. It is left uncertain whether or not the fees paid for four years were at the rate of one and two dollars for a machine or fifty per cent. of those sums. The fair inference perhaps is that the Wayne Agricultural Co. did for four years manufacture drills under the license, though it is not entirely clear that the license was not issued after or near the close of that period, so as to make the
58 transaction in reality a settlement for infringement. This is certainly so in respect to the other parties named, who, if they received licenses at all, which is doubtful, received them as evidence of settlements, and these settlements, it is shown, were made either express threats or the fear of suits for infringement.

If for a time the Wayne Agricultural Company made the drills under a license the manufacture was afterwards continued under a different claim of right, and when that claim had been overruled by the court, instead of settling for the infringement on the terms of the license, the company obtained an arbitration, the result of which has not been shown.

The first inquiry is whether or not the proof in respect to payments for infringements was admissible or ought to have been considered by the master at all. I know of no case in which it has been decided that such evidence is competent, and upon principle I am not able to see how it can be. On the contrary, it seems to me clear that it ought not to be received. Proof of license fees charged and paid before use for the right to use an invention is admissible upon the same theory that proof of sales in open market of any marketable commodity is competent, because it shows or tends to show a market price, but settlement for past use of an invention cannot be brought within the rule, because inconsistent with the principle on which the rule rests. The infringer or one who is accused of infringement is from the necessity of the situation under
59 compulsion of making compensation as demanded or of taking the risk of a suit, and how much his action in a particular case of settlement may have been influenced by this or other special considerations it is impossible for the master or the court to deter-

mine, and therefore the inquiry should not be entered upon. The only way to escape the inquiry is to exclude the evidence. To admit it is contrary to the maxim, "*Inter alias acta,*" &c. It involves an attempt to resolve doubt or difficulty by another, *Litem lite solvit.* There are, doubtless, reported cases in which it appears that such evidence was received and considered, but generally this has been done without objection and uniformly (so far as I know) without a judicial declaration or decision that it was proper.

In the opinion of the court in Packet Company *vs.* Sickles, 19 Wall., 611, the rule is reaffirmed, as laid down in Seymour *vs.* McCormick, 16 How., 480, "that in suits at law for infringement of patents when the sale of licenses by the patentee had been sufficient to establish a price for such licenses, that price should be taken as the measure of his damages against the infringer." "The rule thus declared," it is added, "has remained the established criterion of damages in cases to which it was applicable ever since," and further on in the opinion it is said, and it affords a clear interpretation of the rule in respect to the point now mooted: "In such a case nothing is more reasonable than that fixed by the patentee for the
60 use of his invention in his dealings with others, and submitted to by them before using it should govern."

This, it is true, is the rule of law, but the complainants, waiving their right in equity to claim an account of profits, have invoked the same rule here and must abide by it as it is.

See also Black *vs.* Munson, 14 Blatchf., 268.
Greenleaf *vs.* Yale Lock M'f'g Co., 17 *id.*, 253.
Matthews *vs.* Spangenberg, 14 Feb. Rep., 350.
3 Southerland Damages, pp. 601–607.
1 Greenleaf Evidence, sec. 174.
Wharton Evidence, sec. 1199.
Abbott's Trial Evidence, 188, 189.

It follows that the proof of damages made in this case, excepting that in reference to the license granted to the Wayne Agricultural Company, must be rejected and should have been disregarded by the master; and this being done, does there remain evidence sufficient to support the master's conclusion? It seems probable that the master himself would have thought not; as it was he came to that conclusion "with considerable reluctance."

The rule, as already stated, requires "a sale of licenses" sufficient to establish a price for such licenses. "A royalty in order to be binding on a stranger to the licenses which establish it must be a uniform royalty." Walker on Patent, 390. These and the like expressions and definitions found in the cases and text books imply that proof of a single license is not sufficient, and if under some circum-
61 stances such proof might be deemed adequate that in this instance is not of such clear and unequivocal character as to give it such weight.

Proctor *vs.* Brill, 4 Fed. Rep., 415.
Judson *vs.* Bradford, 3 Ban. & A., 539.
Black *vs.* Munson, 2 B. and Arden, 623.

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Proctor *vs.* Brill, 4 Fed. Rep., 415.
Judson *vs.* Bradford, 3 Ban. & A., 539.
Black *vs.* Munson, 2 B. and Arden, 623.

It is true in a sense, doubtless, that the owner of an invention has a right to fix his price upon it, but to constitute evidence against an infringer he must have fixed it "in his dealings with others" and not merely in a form of license which he was willing to grant. It is, as it appears to me, entirely inadmissible in law or in equity that a patentee may, by inserting in his licenses a claim for a certain royalty with a proviso that half of that sum will be received in full in case of prompt payment, acquire a right to demand the entire sum of an infringer. If he can arbitrarily make such a discrimination he may as well make the ratio three to one or any other proportion. The question is, What is a reasonable royalty? The laws of the land fix the rates of interest for the forbearance of money, and if it be possible to make a discrimination against infringers of patents over prompt-paying licensees greater than lawful interest (except as may be done by the court under the statutory provision for treble damages) it must be done, as it seems to me, upon some competent evidence other than an arbitrary clause in a license or licensees, however many of them may have been issued.

62 The same may be said in reference to the clause in the license which requires that the specified royalty shall be paid for every drill "containing any of the patented improvements." This, as it seems to me, affords no proof, certainly not conclusive proof, against an infringer that he should pay the entire royalty named in the license for infringing only one of two or more claims of a patent unless the one infringed be shown to be the only claim which has or had any value, or that the different claims were substantially the same.

In respect — two or more claims in a patent, each of value and distinct from the other, one cannot equal all in value, any more than in mathematics a part can equal the whole. The licensee may, if he choose, bind himself to pay the same price, whether he use the entire invention or a part only, but at the same time he acquires the right to use all, and so his agreement may not be unreasonable; but if, as against an infringer, such a license can have any force, reasonably, it must be in the way only of establishing a royalty for the entire invention. This view is in accordance with authority.

In Birdsall *vs.* Cooledge, 93 U. S., 64, it appears that the alleged infringement was of one only of three claims in the letters patent, and the Court says: "Still it is obvious that there cannot be any one rule of damages prescribed which will apply in all cases, even when it is conceded that the finding must be limited to actual
63 damages. When the patented improvement has been used only to a limited extent and for a short time" the jury should find less than the amount of the license fee.

See also Procter *vs.* Brill, *supra.*
Wooster *vs.* Simonson, 16 Fed. Rep., 680.
Ruggles *vs.* Eddy, 2 Bann. & Arden, 627.

Without further evidence the plaintiff is entitled to nominal damages; but that there may not be a failure of justice the case is remanded to the master, with direction to admit further evidence by each party if offered, and to report the same and his conclusions.

64 Testimony taken in the above-entitled cause, before William P. Fishback, master in chancery, at the office of the clerk of the United States courts, in the city of Indianapolis, on Wednesday, June 15th, 1881.

SQUIRE RUDE, being first duly sworn according to law, testified as follows:

Direct examination by Mr. BOYD:

Q. 1. Are you one of the defendants in this case?

A. Yes, sir; I am.

Q. 2. State, if you can, the amount of profits realized by your company from the manufacture and sale of the 300 one-horse drills prior to 1879 due to the invention here in controversy.

A. I do not think we received any.

Q. 3. State, if you can, the amount of profit realized by your company by the sale of the 300 one-horse drills reported by you as having been sold prior to 1879.

A. I could not answer the question.

Q. 4. When did your firm commence the manufacture of grain drills?

A. In 1868, I believe.

Q. 5. How many did you make that year?

A. I could not tell; I think about forty.

Q. 6. That was in 1868?

A. Yes, sir. I want to make an explanation right there, with your permission. Those drills were a slide-feed drill and not a force-feed drill.

Q. 7. How many and what kind did you make in 1869?

65 A. I think we made probably about half that number of the same class machines.

Q. 8. How many and what class in 1870?

A. As near as I can tell we made six of the force feed, like the Exhibit Defendants' Hopper, with seed cups and driving shaft, and during the same season we probably made a few of the slide-feed machines.

Q. 9. What kind did you make the following year, 1871?

A. We made a different machine from that—the counter-shaft, or the shaft could not be taken out at will.

Mr. PECK: I object to this form of examination, going through their whole business from year to year and giving a description thereof of the different kinds and classes of feed then made, when the exhibit is the only feed before the court and the only feed upon which the court has found an infringement, so the whole ground as to the recovery for damages and profit relates to this kind of feed, and an inquiry into any other character of feed is, I think, objectionable.

Mr. BOYD: We propose to show that wherein all these different machines he made in that year differ from the others.

Objection overruled; to which ruling of the master defendants, by their counsel, then and there excepted.

Q. 10. Was that the only difference?

A. That was the only difference I remember.

Q. 11. You say counter-shaft in your answer; what do you mean by that?

A. I will qualify that by saying the driving shaft.

66 Q. 12. How many of these machines of the kind mentioned in your last answer did you make and sell that year?

A. I think about twenty.

Q. 13. What kind did you make in 1872?

A. We made still a different machine from the one last described.

Questions by the MASTER: Did you make any more of these like the ones you made in the previous year?

A. In part; we quit making them. We did not make any like that as a whole.

Q. After what time?

A. After 1871.

Q. State wherein those you made in 1872 differed.

A. You want the description of difference?

Q. The number first, if you have got it, of those you made in 1872.

A. My recollection is we ordered 100 set of irons and completed 70 machines.

Q. Go on and state the difference.

A. The cylinder or feed roll, with the exception of possibly a dozen, were cored straight *threw* a square hole and straight.

By Mr. PECK:

Q. So as to be the same size as the shaft?

A. The orifice was level or nearly so.

By the MASTER:

Q. In these machines you last mentioned was there anything like this (reading from claim No. 6, patent No. 30685)?

A. I think not.

Q. Or anything substantially like it?

67 A. The opening, in place of being curved round, as that is, was curved level.

Q. I am asking you whether you used the particular part of the claim in the machine you made in 1872?

A. The shaft was not removable at will.

By Mr. BOYD:

Q. 14. What supported the feed roll in the case?

A. The same as this Exhibit "Root's Hopper."

Q. 15. Why could not the shaft be removed then?

A. From the fact that the shaft was bearded to hold it in place in place of boring and keying.

Q. 16. At how many points did you beard the shaft?

A. At two points for the whole shaft.

Q. 17. After removing the beards the shaft could be removed, could it not?

A. If the beards were removed, of course.

Q. 18. Cannot you produce one of these devices that you have just described?

A. I presume I could. I would not know now where to find one. We have none in our possession.

Q. 19. Can you give the name of any person to whom you sold them?

A. I do not recollect.

Q. 20. Why did you change the form of the discharge that season?

A. That was done by the moulder; for what reason I do not know.

Q. 21. Who was the moulder?

A. If I mistake not the Dayton Machine Company.

Q. 22. Did you get all your castings for the feeds that year from the Dayton Machine Company?

68 A. I am not positive as to that.

Q. 23. From whom else did you get them that you remember of?

A. I do not know that we got any from anybody else, but may have.

Q. 24. What kind of machine did you make in the year 1873?

A. Similar machines to those made in 1872.

Q. 25. You made more than one kind in 1872?

A. The latter described; that is my recollection.

Q. 26. Where did you get the castings for those?

A. I do not remember the name of the firm, but I think it was the Variety Iron Works, at Hamilton, Ohio.

Q. 27. I will read the first and second claims of patent No. 30685, mentioned in the decree, and ask you whether the drills made in 1873 by you contained the device named?

Objected to.

A. I do not recollect anything about the short bar at the bearing in the case, but the discharge, according to my recollection, was level, not oblique. The inside was curved, but a general level surface.

By the MASTER:

Q. You have not the patterns from which the castings were taken?

A. No, sir; our patterns were all burned in 1868.

Q. Was the pattern intended to make that point of discharge exactly straight?

A. They were curved from the inside.

Q. How much less of a depression did they make than there is here from the centre?

69 A. Not $\frac{1}{3}$ as much as there is there. It was intended to be straight.

Q. As straight as you could make it?

A. Yes, sir; that is my recollection of it.

By Mr. BOYD:

Q. 28. Did you make your own castings in 1878 from the time of the fire or before it?

A. No, sir.

Q. 29. How did you happen to have your patterns there?

A. My patter-s were brought home, except the patterns that were used in 1878.

Q. 30. Did you take the patterns away from the Variety Iron Works?

A. Yes, sir.

Q. 31. When did you do that?

A. I could not tell you the date exactly, but it was after we commenced getting our castings from Sohn, Reutchler & Co., at Hamilton, Ohio.

Q. 32. When did Sohn, Reutchler & Co. commence to make them?

A. I cannot tell you now. I do not know the exact length of time that the various works made them.

Q. 33. How many drills did you sell in 1873?

A. About one hundred.

Q. 34. How many and of what kind did you make in 1874?

A. Supposed to have made from 125 to 150. They were different from the machines of 1873 in this: The mouth of the cup was cut nearly the shape of Exhibit Root's Hopper. That was done to make it draw more readily from the sand. The shaft was, as de-
70 scribed, before being bearded, the same as we used in the years
of 1872 and 1873. The cylinder was similar to the one in the machine made in 1872 and 1873, with this exception, that the square hole through the cylinder was made tapering from the centre to each and for the purpose of casting the same without a core, lifting from the centre in the cup and the other part left in the drag, making what foundrymen, I believe, know as a green sand core.

Q. 35. Then the cylinder had a single shaft bearing larger than the shaft and shorter than the cylinder?

A. The shaft only bore on a part of the entire length of the cylinder.

Q. 36. State whether or not it was shorter than the cylinder.

A. It is shorter.

Q. 37. Where did you get the castings for those?

A. My recollection is it was from Sohn, Reutchler & Co.

Q. 38. When did you make the next change, if any?

A. I presume the next season.

Q. 39. What change did you make then?

By Mr. PECK: I object to all this, too, and reserve my exceptions.

A. The next season's machine—that would be 1875, as near as I can recollect—was cored with the shaft bearing in the centre, leaving a short shaft bearing similar to Exhibit Root's Hopper; the bearing in the sides of the feed cup the same and the discharge opening the same as Exhibit Root's Hopper.

Q. 40. State how many of those you made.

71 A. We will put it at, say, 100.

Q. 41. Were these mounted so that the shafts could be removed?

A. The shafts were bearded in the same as I have described before.

Q. 42. How long did you continue to make machines like those of 1875?

A. I think for that year and the following—1875 and 1876.

Q. 43. How many did you make in 1876?

A. I do not think there was one made in 1876, but there was no change that I know of. That is what I alluded to.

Q. 44. Was there any made in 1877?

A. None the same. The grain blew down for both years, and there was no demand for the machines.

Q. 45. What kind of a machine did you make in 1878 and how many of them?

A. Straight; about 200, possibly more, which were consumed in our fire.

Question by the MASTER: What was the date of the fire?

A. July 7th, 1878.

Q. 46. Did not you advertise to duplicate the parts of these old drills you have spoken of?

A. We did not; no, sir; we have had no patterns since the fire.

Q. 47. Did not you advertise to do it, and have not you done that since the fire?

A. Not that I remember of.

72 Q. 48. When did you commence again after the fire to build drills; in 1879, was it not?

A. We commenced the next spring—yes, sir.

Q. 49. Describe the feed of the drill made in 1879.

Objected to.

A. I believe there was no change except in the coring of the feed cylinder. That was cored with a round straight hole until near one end, and then a square hole larger than the shaft.

Q. 50. You mean by no change that it was the same as the machine made in 1877?

A. I would presume so; they were the same as Exhibit Root's Hopper.

Q. 51. How many did you make in 1879?

A. I could not tell, but think about 75 to 100. It may possibly have been more; I am not positive.

Q. 52. How many and of what kind did you make in 1880?

A. Similar to those last described; about 200 machines—I believe I am wrong. I think part of those machines made in 1880 were straight discharge, opening level.

It is admitted that patent No. 31819 expired March 26th, 1878.

Q. 53. Where did those straight ones go to?

A. I know nothing about it now.

Q. 54. Have you kept books since the fire?

A. Yes, sir.

Q. 55. Have you examined your books to ascertain the number made and sold?

A. I have not; I have not had time to examine them.

73 Q. 56. How did you come by the data you have been reading from or referring to?

A. We made it up from memoranda; the three of us together.

Q. 57. What three of you?

A. Myself and partners.

Q. 58. Did any person other than the Dayton Machine Company, the Variety Iron Works, and Sohn, Reutchler & Co. make castings for you?

A. I believe the Dayton Malleable Iron Works made some castings for us.

Q. 59. For what years?

A. I could not tell you about that. A. N. Hadley and Co. of Richmond made castings for us.

Q. 60. Cannot you state when they made them?

A. I cannot tell you; they were among the first irons we had made.

Q. 61. All these—these new ones among the first?

A. I do not know when the Malleable Iron Company made them. Hadley & Co. made them, I think, among the first.

Q. 62. Have you sold since last year or have you on hand now any drills like those sold last year?

A. None that I know of.

Q. 63. Were those drills you have named for the several years one-horse or two-horse drills?

A. One-horse—all those I have mentioned; there was a few two-horse drills, maybe, possibly a dozen, from a dozen to twenty; I do not know just the number; I do not know just when they were made.

74 Q. 64. Cannot you approximate the time when they were made?

A. I would think about 1875 or 1876.

Q. 65. Those were not included in those machines you have given?

A. No, sir; I had forgotten about them.

Q. 66. Did not you make two-horse drills in 1879?

A. Yes, sir; 1879 and 1880.

Q. 67. The same kind both years?

A. Yes, sir.

Q. 68. Were those like Exhibit Root's Hopper?

A. No, sir.

Q. 69. What was the difference as far as the bearing of the cylinder and the discharge orifice was concerned?

Objected to for the reasons heretofore stated.

A. One end bearing of the cylinder rested on the feed shaft; the other end of the cylinder rested within a rosette. The discharge differed from those one-horse drills in this, that it was higher at one side of the opening than at the other; not from the center bearing (referring to Exhibit Root's Seed Cup).

Q. 70. The cylinder of the feed made in 1879 and 1880, which you say rested on the shaft at one end, was cored out at the fluted end which only rested within the rosette?

A. That is what I said; that is correct.

Q. 71. And the cup had an oblique discharge with a passage between the feed roll and the bottom of the cup, did it not?

A. Yes, sir.

Q. 72. How many of the style you have just described did you make and sell in each of those years?

A. I could not tell you.

75 Q. 73. Can you tell by reference to your books?

A. I presume we could.

Q. 74. Cannot you approximate the number that was made in 1879 and 1880 each year?

A. I suppose there were from 800 to 1,000 made altogether in both years. It might have been more, and it might have been less.

Q. 75. Have you made any feeding devices similar to those last described or any having the oblique discharge during the present year?

Objected to as irrelevant.

A. A few.

Q. 76. How many and how recently?

A. I could not tell you how many; I have no means of knowing; but not since early in the year 1881. Possibly none since the 1st day of January, 1881. Since that time they were made similar to Exhibit Root's Seed Cup.

Q. 77. Did you not make two horse-drills in 1877 & 1878?

A. We did not in 1877; was getting ready to build in 1878, and lost our material by fire.

Q. 78. Cannot you state the profit made on either the one or two horse drills either per drill or for the gross number or a number made in any one year due to the invention in controversy?

A. I do not think that the invention was of any direct advantage; our drills are selling as readily and are giving as good satisfaction to the trade as formerly without the use of their combination — with them.

76 Q. 79. Cannot you answer the last question with reference to the profits on the whole drill without reference to whether it infringed or did not infringe the combination of the invention in controversy?

A. No, sir; I cannot.

Adjourned until ——, 1881, 10 o'clock a. m.

77 Circuit Court of the United States for the District of Indiana.
In Equity.

JOHN M. WESTCOTT *et al.*
vs. } No. 4314.
SQUIRE B. RUDE *et al.*

Before the master.

The defendants will take notice that the complainants will examine witnesses in this cause, under the 67th rule in equity, as amended, at the office of Pringle and Johnson, city of Springfield, in the county of Clarke, in the State of Ohio, on Thursday, the 8th day of January, 1885, beginning said examination at 10 o'clock a. m. of said day, and continuing from day to day until completed.

WOOD & BOYD,
Solicitors for Complainants.

Received copy Jan'y 6th, 1885.

STEM & PECK, *For Def.'ts.*

Circuit Court of the United States for the District of Indiana. In Equity.

JOHN M. WESTCOTT *et al.*
vs. } No. 4314.
SQUIRE B. RUDE *et al.*

Examination of witnesses on behalf of the complainants under the 67th rule in equity, as amended, pursuant to the annexed notice.

Present: Edward Boyd, Esq., for the complainants, and
78 Arthur Stem, Esq., for the respondents.

By request of parties, it is ordered that the depositions be taken by question and answer.

JAMES A. MAILEY, a witness produced on behalf of the complainant-, being first duly sworn, deposeth and saith, in answer to interrogatories propounded to him by EDWARD BOYD, Esq., of counsel for the complainant-, as follows:

Question 1. State your name, age, residence, and occupation.
Answer. James A. Mailey; residence, Dayton, Ohio; age, 48 years; occupation, manufacturing and selling agricultural implements for the grain trade.
Ques. 2. With what concern do you manufacture grain drills?
A. Farmers' Friend Manufacturing Co. of Dayton, Ohio, of which Co. I am vice-president.
Ques. 3. How long has the Farmers' Friend Manufacturing Co. made grain drills?
A. The present organization—about fifteen years.
Ques. 4. What is the most important feature of the grain drill?
A. The feeding device.

Ques. 5. How long have you been connected with the grain-drill business?

A. About 12 years.

79 Ques. 6. In a force feed in which fluted cylindery is employed what are the advantages of a conduit in back of and under the cylinder for the passage of the seed from the cup to the elevated delivery?

A. The conduit, in my opinion, would be indispensable, as without it the grain would be ground and crushed between the cylinders and the walls of the cup.

Ques. 7. What are the advantages due to an oblique discharge in connection with such a passage and cylinder?

A. The oblique discharge provides for a more even distribution in flow of the grain.

Ques. 8. How do present prices for drills compare with the prices at which they were sold, say, from 1872 to 1876?

A. The prices of drills at present are about 20 per cent. lower than they were at that time.

Ques. 9. Assuming that manufacturers had not the right to make grain drills with the passage and oblique discharge around the distributing cylinder, what, in your opinion, would have been a reasonable royalty or license fee per drill for the privilege of making and selling two-horse grain drills, say, between 1875 and 1878?

A. In my opinion, from three to five dollars would have been reasonable royalty under the conditions stated.

Ques. 10. Answer a similar question in reference to one-horse drills.

80 A. A royalty of from two to three dollars for one-horse drills would be a fair estimate.

Ques. 11. Are you an inventor and patentee of improvements yourself?

A. I have taken out two or three patents for improvements in agricultural implements.

Cross-examined by Mr. STEM:

X Ques. 1. What improvements of importance have been made in grain drills since 1875?

A. The improvements that have come into most general use since that time are pressure on the hoes—the use of shoes and runners instead of hoes and attachments of various kinds for sewing fertilizing material with the grain.

X Ques. 2. These various improvements add very materially to the value of a grain drill, do they not?

A. They supply a want that add to the value of a drill and the convenience in using the same.

X Q. 3. What would be the difference, in your opinion, in the market price of a drill having these improvements as compared with a drill without them?

A. I should think that about three dollars for the spring pressure, and the fertilizing sewers much more—from fifteen to twenty dollars.

X Q. 4. Is there any difference in the market price of drills
81 manufactured by your company and drills manufactured by
the Wayne Agricultural Co.?

Objected to as irrelevant.

A. I think the prices generally are about the same.

X Q. 5. How long has your Co. manufactured a force-feed drill?

A. Ever since the present Co. has been in existence.

X Q. 6. Have they always used a feed having an oblique discharge and a channel back of and under a fluted cylinder for the passage of the grain?

A. They have not.

X Q. 7. When did they begin, if at all, to use these features?

A. They have never used the oblique discharge and have used the fluted cylinder for about 6 or 7 years. They have always used a channel between the feed wheel and the cup.

X Q. 8. What sort of a feed wheel did you use before adopting the fluted cylinder?

A. It was a wheel having "V" shaped ribs & placed in a zigzag manner over the feeding surface of the wheel.

X Q. 9. Have you ever paid any royalty for using the channel described?

A. We have paid a royalty on the feed last described which has the channel, the elevated mouth in connection with the zigzag ribs on the feed wheel.

82 X Q. 10. To whom did you pay this royalty and under
what patent or patents?

A. The royalty was paid to Mr. B. Kuhns, a member of the Co., but the number of the patent I do not remember.

X Q. 11. What was the amount of this royalty per drill?

A. We paid Mr. Kuhns one and $\frac{50}{100}$ dollars royalty.

X Q. 12. That royalty covered all the features claimed in his patent, did it not?

A. I do not remember now what the conditions were.

X Q. 13. The purpose and effect of the channel described is the same whether used in connection with a cylinder, with zigzag ribs, or a fluted cylinder, is it not?

A. About the same.

X Q. 14. Force feeds are made without a fluted or zigzag-ed cylinder and without the channel described, are they not?

A. Some are made with a vertical wheel having spurs, which elevate the grain, but all have the channel.

X Q. 15. Did you ever know of any one paying the royalty named for using the features you have described, viz., the channel and the oblique discharge?

A. I do not know personally of such royalty being paid, but have
learned during my business experience of royalties ranging
83 from $2.00 to $5.00 & more having been paid for the use of
feeding devices.

X Q. 16. Have you ever known or heard of any one paying the royalties named for the right to use the channel and oblique discharge shown and described in the patent sued on in this case?

A. All have had the channel and, I think, some the oblique discharge.

X Q. 17. With the royalties paid under this patent or under some other patent or patents?

A. Some have been paid under this patent and some under the other patents.

X Q. 18. Whoever paid a royalty under this patent of $3.00 to $5.00 for two-horse drills and two to three dollars for one-horse drills?

A. I think the Wayne Agricultural Co. paid a royalty under this patent. I do not know the amount.

X Q. 19. Your Co. does not use the oblique discharge now, does it?

A. It does not.

X Q. 20. Was there any material difference in the market prices of drills manufactured by your Co. and those manufactured by the Hoosier Drill Co. during the period between 1875 and 1878?

A. During that period we used the zigzag feed referred to,
84 and we aimed to get about the same prices as the Hoosier Drill
Co., and I think we did get about the same prices.

X Q. 21. How did your prices compare with the prices of the Wayne Agricultural Co. during the same period?

A. I cannot tell, as I was not so well informed in regard to the drill manufactured by that Co.

Re-examination by Mr. Boyd:

Q. The zigzag ribs on the wheel mentioned by you moved past the discharge orifice obliquely, did they not?

A. They did.

Q. 2. What was the purpose in having these ribs zigzag instead of straight?

A. To secure a more even discharge of the grain.

Q. 3. Do you contemplate using the oblique discharge in future?

A. We have had some conversation in regard to it, but it has not yet been definitely determined.

Q. 4. Has the expiration of the term of the patent sued on had anything to do with this, and when did you learn that it had expired?

A. We learned only a few weeks ago of the expiration of the patent and that brought up the conversation in regard to the change.

Q. 5. Will you see if you can ascertain the date and num-
85 ber of the patent under which your Co. paid the royalty to
Mr. Kuntz, and give them after recess?

A. I will. Since recess I have ascertained that the number of the patent is 87052, dated February 16, 1869, issued to B. Kuhns.

Recross-ex.:

Q. Are not your Co. and the Hoosier Drill Co., of which Mr. Westcott, the complainant, is president, members of a drill manufacturers' combination of which the defendant Co. is not a member?

Objected to as irrelevant and not cross-examination.

A. No, sir.

Q. Are not your Co. and the Hoosier Drill Co. members or stockholders of a company composed of drill manufacturers, said company being organized for the purpose of owning and control-ing patents, regulating prices, and like objects, and is the defendant Co. interested in that Co. or combination?

Objected to as irrelevant and not cross-examination.

A. No, sir.

Q. Are not your Co. and the Hoosier Drill Co. or the stockholders or officers of these two Co.'s also stockholders in the Grain Drill Manufacturers' Co.?

86 Objected to as irrelevant and not cross-examination.

A. Two of the members of our Co. are stockholders in the Grain Drill Manufacturer- Co., and one of the stockholders of the;Hoosier Drill Co. is a stockholder in the Grain Drill Manufacturers' Co.

JAMES A. MARLEY.

Charles E. Patrick, a witness called on behalf of complainant-, being first duly sworn, testified, in answer to questions by Mr. Boyd, as follows:

Q. 1. State your name, age, residence, and occupation.

A. Charles E. Patric; age, 47 years; reside at Springfield, Ohio, and am a member of the Superior Drill Company, manufacturers of grain drills and other agricultural implements.

Q. 2. State the extent of your experience as inventor and manufacturer of improvements in grain drills generally.

A. My experience as inventor commences with the year 1864 or 1865, since which time it has been my study and business—you might say entirely so, as I have had no other business. As a manufacturer my experience dates from the formation of the Superior Drill Co., as a stockholder, in November, 1883. Prior to this time, 87 dating back to 1867, I operated through licenses.

Q. 3. Since the introduction of force-feed grain drills what kind of a market has there been for slide or gravity feeds, if any?

A. I would say none at all, so far as I am aware.

Q. 4. In a force feed in which a fluted cylinder is employed what are the advantages of a passage back of and under the cylinder for the conduct of the grain to an elevated discharge orifice?

A. The object is to admit and conduct the grain without injury.

Q. 5. Could the grain be so conducted in a force feed employing a fluted cylinder without such a passage-way?

A. It could not.

Q. 6. What are the advantages due to an elevated oblique discharge in connection with such a conduit and cylinder?

A. The advantages of an elevated discharge is to give uniformity of distribution in seeding unlevel and hilly ground—to prevent sowing greater quantities when passing up an incline. The oblique-delivery opening serves to made the seeding more regular, without which it would fall in bunches.

88 Q. 7. What is the most important feature in a grain drill?

A. It is the distribution or feeder, sometimes called the feeding mechanism.

Q. 8. How do present prices for grain drills compare with the prices about ten years ago?

A. They are very much less; from 25 to 40 per cent. less.

Q. 9. Assuming that manufacturers had not the right between 1875 and 1878 to make grain drills with a passage around the cylinder and an oblique discharge as before described, what, in your opinion, would have been a reasonable license fee for the privilege of making and selling 2-horse grain drills with these features at that time?

A. Basing an answer on my judgment and experience, I would say about five dollars.

Q. 10. Under like assumptions, how much would you say for one-horse drills?

A. I am not familiar with the prices of one-horse drills to any great extent, believing, however, that the advantages of these features would be, perhaps, equally important to a one-horse drill; perhaps two or three dollars; possibly this may be a trifle high.

89 Q. 11. Now, assuming that the channel before described was old in connection with a peripheral distributing wheel, what, in your opinion, would be a reasonable license fee for the privelege of making and selling two-horse drills with the oblique discharge?

Ans. Well, I would say, perhaps, two dollars and a half.

Q. 12. Was the Superior Drill Co. organized as a new company in 1883, or did it succeed to the business of some other company; and, if so, how long had its predecessor been in business?

Ans. It succeeded Thomas and Rodgers, who succeeded Terrell, Ludlow & Rodgers, who began under my patents in 1867 or '8, I am not positive.

Ques. 13. State your experience and general knowledge as to the amount of royalties which have been paid for the seeding mechanism of grain drills.

Objected to as irrelevant and immaterial.

Ans. I licensed Terrell, Ludlow & Rodgers at $7 per drill. The license to Thomas, Ludlow and Rodgers was upon a sliding scale not more than five $\frac{25}{100}$ or less than $3 per drill, the amount becoming less as the number each year increased. If they made less than 750 drills in a year the royalty was $5.25. If more than 90 that and less than 1,000 the amount was $4.75, and so on down. I licensed a factory in Urbana, in 1867, at $7.00 each drill. I have licensed several other factories at prices ranging about as above. I remember of seeing printed blank licenses of Bickford & Huffman to a party in the South, in which the amount was printed at $10.00. Mr. Bickford told me that this amount was to be the fee, but did not see any licenses after being executed. I don't know that I have any general knowledge that would differ from my own experience as to terms of royalty.

Q. 14. In what year was the license granted to Thomas, Ludlow & Rogers?

A. In 1872.

Q. 15. Do you know the amount of license fee received by the owners of the Davis patent for hoe-shifting device?

A. $2.00 per drill.

Cross-examination:

X Q. 1. When were force feeds first introduced?

A. According to the best of my knowledge, about 1862.

X Q. 2. How many different kinds of force feeds have been manufactured between that time and 1880?

A. There are two general classes of force feeds—one generally known, I believe, as a peripheral feed having flutes or ribs
91 parallel or spiral on the periphera which serve to carry the grain out. The other is a lateral projecting flange having small ribs in its internal surface. I would hardly attempt to give the exact number of the different modifications, especially of the former class.

X Q. 3. To which of these classes did the drills manufactured by your licenses belong?

A. To the one last mentioned.

X Q. 4. In these was there a channel around the feed wheel, between it and the walls of the cup?

A. No, sir; there was not.

X Q. 5. Under how many different patents were the licenses you have spoken of granted?

A. The license in 1867 was on two patents. I am not positive whether two or three—two to the best of my recollection.

X Q. 16. Do you remember how many claims those patents had?

A. I do not.

X Q. 17. How many patents did you take out or own during the continuance of the license—that is, covering the license to Terrell, Ludlow & Rodgers, & Thomas, Ludlow & Rodgers?

A. It is impossible for me to tell exact. I was taking out patents on inventions as I made them from time to time, perhaps
92 embracing 20 patents in all. Some of the devices embraced in these patents were being laid aside for others more recent.

X Q. 18. Didn't your license to these parties permit them to use any of your inventions applicable to grain drills?

A. It did.

X Q. 19. From 1875 to 1878 what license fee was paid by these parties, if you recollect?

A. On numbers reaching beyond 1,500 per year, $3.00.

X Q. 20. About how many patents did you have at that time on grain drills?

A. It is impossible to state exact; I will say 20 to 25.

X Q. 21. The license provided that the license might use any improvements you might thereafter make without any additional fee, did it not, during the continuance of the license?

A. Yes, sir.

X Q. 22. How many different manufacturers were making drills with a force feed having a fluted feed wheel between the years 1875 and 1880, as nearly as you can state?

A. Nine or ten, as I remember now.

X Q. 23. Did you ever hear of any of these paying any license fee for the right to use a channel around the feed wheel and the oblique discharge?

93 A. Of my own knowledge I can't say. I have heard of license fees being paid on these devices. I can't state by whom nor the amount.

Re-examination:

Q. 1. What was the principal patented feature covered by your license?

A. The feeding mechanism.

Q. 2. If the seeding mechanism was used did they have to pay the full fee whether any of your other improvements were used or not?

A. That is my understanding of it.

Q. 3. Was the feeding mechanism used continuously by your licensees while in business?

A. It was.

Q. 4. About what was the proportion of peripheral and lateral flange force-feed drills sold between 1875 and 1880?

A. There were a great many more peripheral feeds sold from the fact that there were so many more engaged in manufacturing it; perhaps three to one.

C. E. PATRIC.

STATE OF OHIO,
County of Clarke, } *ss:*

I, James Johnson, Jr., a notary public within and for said county, selected to act as special examiner, under the 67th rule in 94 equity, as amended, in the cause stated in the caption, do hereby certify that the foregoing examination was had, pursuant to the annexed notice, at the office of Pringle & Johnson, city of Springfield, on Thursday, January 8, 1885, at 10 o'clock a. m.

I further certify that at the said time and place I was attended by James A. Marley and Charles E. Patric, witnesses produced on behalf of the complainant-, they being of sound mind and lawful age, and the said witnesses were, previously to the commencement of their depositions, by me severally cautioned and solemnly sworn to testify the truth, the whole truth, and nothing but the truth, and the depositions hereinbefore appearing were by me reduced to writing in the presence of and read over by me to said witnesses, and were thereupon subscribed by them in my presence.

I further certify that I am not of counsel nor attorney nor relative of either of the parties to this cause nor in any manner interested in the result thereof.

In testimony whereof I have hereunto set my hand and affixed my seal of office this 8th day of January, 1885.

[SEAL.] JAMES JOHNSON, Jr.,
Notary Public, Clark County, Ohio.

95 In the United States Circuit Court, District of Indiana.

John M. Westcott *et al.*
vs. No. 4314.
S. B. Rude *et al.*

Before W. P. Fishback, master.

Depositions of L. L. Lawrence and Jesse P. Fulgham, taken by agreement of parties at the law office of Henry C. Fox, in Richmond, Indiana, on the 2nd day of January, 1885, before me, Perry J. Freeman, acting commissioner by consent.

L. L. Lawrence, being by me first duly sworn to testify the truth, the whole truth, and nothing but the truth relating to said cause, deposes and says:

Ques. 1. State your name, age, place of residence, and occupation.

Ans. My name is Levi L. Lawrence; my age is sixty-three years; residence, Richmond, Indiana; my occupation is that of manufacturer; am president of the Wayne Agricultural Works.

Ques. 2. What is the business of the Wayne Agricultural Co., and how long have you been connected with it?

Ans. The business of the Wayne Agricultural Co. is manufacturing reapers and mowers and grain drills. I have been connected with it since its organization, in 1871.

96 Ques. 3. State the circumstances and reasons why your company took a license under the patents of Hiram Moore sued on in this case.

Ans. At the time that we organized we were manufacturing what we called at that time the Fulgham drill. We were called upon by Mr. Westcott representing that we were infringing the Moore patents. At that time we were anxious to avoid litigation. We thought—the number of drills we were making—it would be better for us to take a license than to fight and litigate the patents.

Ques. 4. When did you quit paying a license and what has been done with regard to Mr. Westcott's claims against you under these patents since that time?

Ans. We quit paying license when we ceased to make that Fulgham drill, as the drill we made after that we considered no infringement on the Moore patents. I can't tell exactly, but think it was in 1876 or 1877 that we quit. Mr. Westcott, I believe, filed a suit in the United States court against us and afterwards it was withdrawn. There never has been any arbitration with regard to this matter.

Ques. 5. Did your company join the combination known as the "Grain Drill Manufacturers' Company?"

Ans. We did.

97 Ques. 6. Does one of the rules of that company provide that any differences between the members shall be settled by arbitration?

Ans. Yes; I believe there is a rule of that kind.

Ques. 7. Have any steps ever been taken by appointing a committee or anything done towards settling this difference between your company and Mr. Westcott's?

Ans. There has not been to my knowledge.

Ques. 8. After the change was made in your drill, in '76 or '77, did you make a drill having a passage arranged between the bottom of the hopper and discharge in combination with an oblique discharge and a toothed distributing cylinder?

Ans. I think we did, and have ever since.

Ques. 9. Are you familiar with the prices of the various grain drills manufactured in this State and Ohio?

Ans. I think I am.

Ques. 10. As president of the Wayne Agricultural Company is it your business to keep yourself posted on these subjects?

Ans. It is.

Ques. 11. State how the prices of your own drill and the Hoosier Company's drill compare with the prices of Farmers' Friend Company's drill and P. P. Mast Company's drill.

98 Objected to as irrelevant.

Ans. I think they were about all one price. In fact, we were all pledged to keep one uniform price.

Ques. 12. How do they compare with the prices of the drills manufactured by John W. Stoddard & Co., D. McSherry & Co., and the defendants, the Rude Brothers?

Objection repeated.

Ans. I think they compare about the same with the Stoddard and the Rude Bros.; but as regards the McSherry I am not posted as to what they sell their drill at.

Ques. 13. How did the prices of these various drills compare with one another between the years of 1875 and '80?

Ans. They all ranged at about the same price.

Ques. 14. Was there any material difference between the market prices of these various drills between the years above named or since?

Objection repeated.

Ans. Along in '75 and '76 the old establishments manufacturing drills had their reputation established and known and might sometimes, perhaps, get a little advantage as to prices than a new drill being introduced and not thoroughly known. That will apply all the way through.

99 Ques. 15. Has your company at any time been able to get any higher prices, on an average, for your grain drill than the Farmers' Friend Co. or P. P. Mast & Co.?

Objection repeated.

Ans. I don't think we have.

Ques. 16. Has the oblique discharge in combination with the passage and fluted cylinder above referred to been as advantageous to your company in selling this grain drill?

Ans. I don't know that we ever made a point of selling our drill as being superior to others in that respect.

Ques. 17. As a matter of fact, will your grain drill feed the grain any more evenly with the oblique discharge than without it?

Same objection.

Ans. I don't think it will feed any more evenly than it would with a straight discharge.

Ques. 18. I now call your attention to letters patent No. 30685 and ask you whether a drill constructed with a feed like that shown in the drawing would sell in the market now, in competition with the drills at present manufactured?

Same objection.

Ans. I don't think it could be sold in the market.

Ques. 19. How would it have been between 1875 and '80?

100 Ans. I don't think it could have been sold then.

Ques. 20. What was the change you made in your drill in '76 or '77 which you thought avoided the infringement of the Moore patents?

Same objection.

Ans. We were then making the Fulgham drill, known as the Fulgham drill, which had a feed wheel cast with a hole for the shaft to pass through, smaller at the centre of the hub than the outside of the hub, to allow it to adjust itself to the shaft. We then changed our quantities of feed by different size of gearing. The change we then made was to avoid changing the gearing without changing so many different cog-wheels.

Cross-examination:

X Ques. 21. Your company first manufactured a grain drill having a slide feed, did it not?

Ans. Not the present company. Its predecessor, Davis, Lawrence & Co., of which I was a member, did.

X Ques. 22. Was the change from that slide-feed drill made to what you have called the Fulgham?

Ans. It was.

X Ques. 23. How much, in your opinion, did the change add to the practical value of the drill?

101 Ans. I don't know what it would be. We were selling drills with a slide feed at that time as high or higher than

nowadays. I am satisfied it makes a better drill. For my own self it would not make much difference.

X Ques. 24. Did you sell the rotary-feed drills for higher prices at that time than you get now?

Ans. It has gone out of my mind what prices we got for drills at that time. It is quite a number of years back.

X Ques. 25. When you say in answer 16 that you did not make it a point of your drills being better than others, did these others you refer to contain the passage-way and discharge as referred to in that question?

Ans. I suppose several of them did contain it. Some did and some did not.

X Ques. 26. In the suit mentioned by you as having been brought by Mr. Westcott against your company, did you contend that you had a license under the Moore patents here in suit or some interest therein which protected your manufacture?

Objected to as calling for matters of record.

Ans. I don't think we represented anything of the kind, only we purchased, as we supposed, an interest in the Moore patents.

102 X Ques. 27. In answer 5 you say that your company joined the Grain Drill Manufacturers' Company. Do you mean this or do you mean that you personally became a member thereof?

Ans. I see that I am in error there. The Wayne Agricultural Company assigned all patents which they owned to me, and I assigned them to the Grain Drill Manufacturers' Company with the understanding that the Grain Drill Manufacturers' Company would grant the Wayne Agricultural Company manufacturer's license, and I became a member of the Grain Drill Manufacturers' Company.

Redirect:

Ques. 28. Which of the manufacturers named in your direct examination use the straight discharge and which the oblique discharge?

Objected to as not re-examination.

Ans. I think P. P. Mast & Co. use the straight; J. W. Stoddard & Co. the same. I do not personally know about the Farmer's Friend Co., but the Reede use the straight; the others use the oblique.

Ques. 29. In becoming a member of the Grain Drill Mauufacturers' Company do you act individually or as a representative
103 of the Wayne Agricultural Co. in the company, as a matter
of fact?

Objected to as irrelevant.

Ans. I act in the Grain Drill Manufacturers' Co. individually. At the same time I represent the interests of the Wayne Agricultural Co.

Recross:

X Ques. 30. Does not P. P. Mast & Co. manufacture a s-ide feed as distinguished from a peripheral like that shown in the Moore patent?

Ans. They formerly made a s-ide feed. It is my understanding that they have dropped it and now manufacture a peripheral.

X Ques. 31. When did they make this change?

Ans. I think it is within the last two years.

LEVI L. LAWRENCE.

JESSE P. FULGHAM, being by me first duly sworn to testify the truth, the whole truth, and nothing but the truth relating to said cause, deposes and says:

Ques. 1. State your name, age, place of residence, and occupation.

Ans. My name is Jesse P. Fulgham. My age is 55 years. My residence is Richmond, Wayne county, Indiana. My occupation is inventor and designer of agricultural implements.

104 Ques. 2. State what experience you have had in connection with the manufacture and invention of grain drills?

Ans. I have been connected with grain drill manufacturings for upwards of twenty years, during which time I have taken out a large number of patents on seeding machines, and by my connection with grain drill manufacturings and in procuring patents have had occasion to make frequent and thorough investigations in regard to the construction and mode of operation of the various seeding machines which have been patented and manufactured.

Ques. 3. State the distinction between slide feeds in grain drills and force feeds.

Ans. There are but two classes of feeds recognized by drill manufacturers, viz., the slide or gravity feed, in which the grain is agitated by a slide or similar device over an opening in the hopper bottom, and the force feed, which consists of fluted, pocketed, or toothed distributing cylinders working underneath the hopper bottom.

Ques. 4. When were force feeds introduced?

Ans. The first force feed that I have any knowledge of was patented in 1840 by a man by the name of Gibbons.

105 Ques. 5. How early were force feeds made which combine a fluted or toothed distributing cylinder with a passage between the periphery and the walls of the seed cup, to your knowledge?

Objected to as irrelevant.

Ans. There were as early as 1846 seeding machines made that had fluted cylinders and a cup or cap having a passage between the periphery of the wheel and said cap or cup forming a conduit or passage for the grain between the hopper bottom and the point where said cap or cup terminated.

Ques. 6. Was this passage around the cylinder in the cup?

Ans. It was a concave passage extending from the point where the grain left the hopper bottom to the point where the grain dropped out from between the teeth or out of the flutings of the feed cylinders.

Ques. 7. Did the passage extend around the feed cylinders or part way round?

Same objection.

Ans. In those earlier devices the passage-way was very short, but as improvements were made the passage-way was extended further around till, in 1850, Flory and Grove and some others, at earlier dates, extended the passage to or beyond the bottom of the feed wheels.

106 Ques. 8. Are you familiar with the construction of the feeding mechanism of the drills manufactured by the Hoosier Drill Co., the Wayne Agricultural Co., Rude Bros., John W. Stoddard & Co., P. P. Mast & Co., and the Farmers' Friend Co.?

Ans. I am.

Ques. 9. State whether any of these companies construct their feeding devices with a conduit or passage arranged between the bottom of the hopper and the discharge in combination with an oblique discharge and a toothed distributing cylinder.

Same objection.

Ans. Some of them do.

Ques. 10. Which ones?

Same objection.

Ans. The Hoosier Drill Co. and the Wayne Agricultural Co. The other parties spoken of do not at present, although some of them formerly did, the Rude Bros. being one of them.

Ques. 11. With regard to those who do not use the combination described, state how their seeding devices differ or what element of the combination they have omitted.

Same objection.

Ans. They differ in having a large seed cup in rear of the feed
wheel which allows the grain to fall unimpeded to the bot-
107 tom of the cup without any motion of the feed wheel, and
also constructed with a straight discharge.

Ques. 12. Do they have the passage and the fluted cylinder named in the combination?

Ans. Not as constructed in the Moore device of the same size from the hopper bottom to the discharge opening, but with a large converging space behind the feed wheel, and having fluted feed wheel.

Ques. 13. My question did not refer to the size of the passage, but is whether or not these seeding devices have a fluted cylinder for distributing the grain with a passage around and under it.

Ans. They have.

Ques. 14. Are you familiar with the prices at which the grain drills manufactured by these various companies are sold by the companies?

Ans. I am.

Ques. 15. How do the prices of the drills manufactured with the oblique discharge—that is, those of the Wayne Agricultural Co. and the Hoosier Drill Co.—compare with the prices of those manufact- were with the straight discharge?

Same objection.

Ans. The prices of all are the same.

108 Ques. 16. How did the prices of these drills compare with one another between the years of 1875 and '80?

Same objection.

Ans. They were all listed at the same price.

Ques. 17. Have you ever made any experiments to ascertain whether the grain will bunch when fed in such a device as has been described without the oblique discharge?

Ans. I have.

Ques. 18. How did you make the experiment and what was the result?

Same objection.

Ans. By feeding grain through cups with both kinds of discharges spoken of, oblique and straight, to see whether there would be a perceptive difference in the flow of the grain from the discharges, and I found by such experiments that I was not able to distinguish any difference.

Ques. 19. Were both these seeding devices on the same drill and operated by the same shaft at the same time?

Ans. No; they were not, but were tested side by side.

Ques. 20. If you covered up the seeding device, leaving the stream of grain visible, could you tell from the streams of grain which came from the oblique and which from the straight discharge?

Ans. I could not.

109 Ques. 21. What, then, is the value of the oblique discharge in combination with the fluted cylinder and passage around it over the straight discharge?

Same objection.

Ans. Since making those experiments my conclusions naturally were that it had no value over the straight discharges, although before making those experiments I had believed that it had a value.

Ques. 22. Would a grain drill constructed with seeding devices such as those shown in the Moore patent No. 30685 sell in the market in competition with the modern grain drill?

Same objection.

Ans. In my opinion, it would not.

Ques. 23. Would it have sold in 1875?

Same objection.

Ans. In my opinion, it would not, though never having been manufactured I could not say positively that it would have sold at all.

Cross-examination:

X Ques. 24. Are you in the employ of the Wayne Agricultural Company?

Ans. I am.

X Ques. 25. Other things being equal, is it your opinion that a straight opening like you have spoken of is the mechanical equivalent of the oblique?

110 Question objected to, as the word- " mechanical equivalent" *is* indefinite and susceptible of different applications.

Ans. My opinion is that theoretically it is not; but practically it proved to be, as I found by experiment, or such is my opinion.

X Ques. 26. Did your knowledge of grain drills commence with your connection with their manufacture?

Ans. No; it did not, as I had seen grain drills operate a number of years previous, my first connection with the manufacture being in the year 1857.

X Ques. 27. Do you consider every drill which has a fluted distributing cylinder working underneath the hopper bottom belongs to the class of force feeds?

Ans. They certainly do, as distinguishing between gravity feed and force feed, the one simply agitating the grain over a hole in the hopper bottom, the grains falling through the hole of its own weight, and the other receiving the grain in the flutings or recesses in the feed wheel and being forced or carried underneath the edge of the hopper bottom before it can fall.

111 X Ques. 28. Is there any substantial difference in the size of the space behind the feed wheel as now made by the Rude Brothers and as made, say, from '75 to '78 by them?

Ans. I think not.

X Ques. 29. Do you not know the drills or seeders containing the distributing devices shown in the Moore patent 30685 were manufactured and sold?

Ans. Not in accordance with the drawings and specifications of the patent spoken of. If they were, I have no knowledge of it.

X Ques. 30. What enabled you in your direct examination to say that such drills had been made?

Ans. The fact that I have never seen them in the market and have never found any one who has.

X Ques. 31. Didn't you see a drill so made some years ago at Milton, Indiana?

Ans. No, sir; I have no recollection of ever seeing such a drill.

X Ques. 32. Did you see parts of such a drill there?

Ans. I have no recollection of ever seeing any part of a drill made according to the specifications and drawings of the Moore patent.

112 X Ques. 33. Do you think that you have seen all the different kinds of drills that have been in manufacture in the United States during the last twenty-five years?

Ans. My impression is that I have seen all that have been put on the market in that time.

Witness desires to answer in explanation of answer No. 23 the following: When I say "It never having been manufactured" I desire to say in addition, or at least never having been put on the market to my knowledge.

Redirect:

Ques. 34. Are you familiar with the drills manufactured by the firm — Van Brunt, of Horicon, Wisconsin?

Objected to as not re-examination and irrelevant.

Ans. I am.
Ques. 35. State whether they use the oblique discharge and what you know about it.
Ans. They do not now, but formerly did.

Same objection to this question.

JESSE P. FULGHAM.

STATE OF INDIANA, }
Wayne County, } *ss:*

113 I, Perry J. Freeman, a notary public within and for said county and State and commissioner by agreement of parties to take the above and foregoing depositions, hereby certify that the above-named witnesses were by me first duly sworn to testify the truth, the whole truth, and nothing but the truth relating to above-entitled cause; that the questions and their answers thereto were reduced to writing in their presence by me; that the plaintiff attended in person and by his attorney, and that the depositions were taken at the law office of Henry C. Fox, in Richmond, Ind., and that after the questions and answers were so reduced to writing by me that the said witnesses, Levi L. Lawrence and Jesse P. Fulgham, subscribed the same in my presence.

In testimony whereof I have hereunto set my hand and notarial seal.

[SEAL.]

PERRY J. FREEMAN,
Commissioner & Notary Public.

114 Circuit Court of the United States for the District of Indiana.
In Equity.

J. M. WESTCOTT *et al.*
vs.
SQUIRE B. RUDE *et al.*
} No. 4314.

Before the master.

Examination of witnesses on behalf of the complainants, under the 67th rule in equity, as amended, pursuant to the annexed notice.

Present: Wood & Boyd, for the complainants, and Arthur Stem, for the respondents.

By request of parties it is ordered that the depositions be taken by question and answer.

JOHN M. WESTCOTT, a witness produced on behalf of the complainants, being first duly sworn, deposeth and saith, in answer to interrogatories propounded to him by Mr. EDWARD BOYD, of counsel for the complainants, as follows:

Question 1. State your name, age, residence, and occupation.

Answer. John M. Westcott; age, 50; residence, Richmond, Indiana; occupation, president of the Hoosier Drill Company, which manufactures grain drills and other agricultural instruments, and I am one of the complainants.

115 Q. 2. If you have a duplicate of the license given to P. P. Mast & Co., as heretofore testified by you before the master, please produce it and make it part of your deposition.

A. I produce it. Here it is, and I make it a part of my deposition—as Mast's license.

Q. 3. About when did you give English & Over the license before testified to before the master, and under what circumstances?

(Objected to as irrelevant by Mr. Stem.)

A. I think it was in the spring of 1875 that I understood that they were commencing the manufacture of grain drills, and when at Indianapolis on other business I called to see them in reference to taking a license, and they informed me that they would investigate the matter and if they thought they were infringing the Moore patent they would take a license. A short time afterward they took a license which, I think, is an exact duplicate of the one granted to P. P. Mast & Co.

Q. 4. Did they subsequently pay the fees stipulated in the license; and, if so, for how long?

(Objected to as irrelevant.)

116 A. They paid each year for two years, at which time they dissolved partnership or sold out and ceased *to* manufacture of drills as the firm of English & Ober.

Q. 5. When did the Wayne Agricultural Company take their license from you?

Obj.—Same objection.

A. In the spring of 1875.

Q. 6. Up to when did they pay the stipulated license fee?

Same objection.

A. In January, 1878.

Q. 7. Did they pay promptly and get the benefit of their discount named in their license?

Same objection.

A. Yes; they paid promptly and got the discount according to the license.

Q. 8. State the circumstances which induced you to grant the license to them at the rate you did.

Same objection.

A. Before we granted any licenses quite a number of grain-drill manufacturers met in Dayton, together with myself, Mr. C. W. West, & our attorney, S. A. Bowman. We had decided to charge a license fee of $5.00 a drill. The grain-drill manufacturers thought if we would make it a low royalty that the manufacturers would settle and avoid litigations, and it would make us more money in the long run than at the higher fee.

117 Q. 9. Referring to the arbitration with the Wayne Agricultural Company mentioned in your former testimony, state why you agreed to arbitrate and what became of your submission.

Same objection.

A. After the suit had been brought against the Wayne Agricultural Company, Mr. L. L. Lawrence, president of the Wayne Agricultural Company, became a member of the Grain Drill Manufacturers' Company, of which I was a member, and, according to the rules and by-laws of the latter organization, we agreed not to bring any suits against members of the same, but were there any differences to be settled it is to be done by arbitration. No award has yet been made.

Q. 10. What is the most important feature of a grain drill, and why?

Same objection.

A. The feeding device is the most important, from the fact that the more evenly the grain is distributed the less seed is required per acre and the more it will produce.

118 Q. 11. In a force feed employing a fluted distributing cylinder, what are the advantages of a channel around the cylinder and an oblique discharge like that shown in the Moore patent 30685?

A. The advantages of the channel keeps the fluted wheel from mashing or grinding the grain and the oblique discharge from bunching the grain.

Q. 12. What per cent. of difference would there be in the price for which drills could be sold which bunched the grain and others in all respects the same except that they did not bunch?

A. That would depend a great deal upon the intelligence of the purchaser. I should say from five to twenty dollars, and a large portion of farmers would not use a drill that bunched the grain if it was given to them for nothing.

Q. 13. How do present prices compare with those of 8 or 10 years ago?

A. Drills are worth a third less at least now than they were 10 years ago.

Q. 14. Assuming that manufacturers had not the right to make grain drills employing the channel and oblique discharge shown in said patent in connection with a fluted cylinder, what, in your opinion, would be a reasonable fee to pay for the privilege of making and selling two-horse grain drills embodying these features?

119 A. Five dollars.

Q. 15. Answer a similar question with reference to a one-horse drill.

A. Two dollars and one-half.

Q. 16. Such being your opinion, why did you grant licenses for two dollars and one dollar with a discount as named in the license produced?

A. For the reasons given in my answer to question 8.

Q. 17. Why did you not grant a greater number of licenses than you have?

Objected to as irrelevant and immaterial.

A. We requested of Rude Brothers, of Liberty, to settle with us for what drills they had made and to take out a license if they wished to continue the manufacture. They informed us that we "might go to hell." Then we brought suit against them, and after commencing suit other manufacturers said they did not want to take out a license, but would await the decision in the Rude case, and in case they infringed or in case the patents were sustained they would settle without any suits.

Q. 18. State whether the Hoosier Drill Company paid a
120 royalty to Joseph Ingels for the privelege of using a force feed
and, if so, the amount per drill.

Same objection as above.

A. The Hoosier Drill Company paid Joseph Ingels a royalty of $2.00 per drill, but it was not on the force feed, but merely an improvement, as he called it; checks formed on the inside of the cup, which prevented the grain from getting between the feed wheel and the sides of the cup and cracking the same.

Q. 19. Was the Ingels patent subsequent to the date of the Moore patent?

A. Yes.

Q. 20. Did the Ingels device employ the channel around the wheel and the oblique discharges as in the Moore patent?

A. Yes.

Cross-examination by ARTHUR STEM:

X Q. 21. For how many years did the Wayne Agricultural Company pay license fees?

A. For three years after taking out the license.

X Q. 22. Has anything been done with regard to the arbitration referred to?

A. No; we have been too busy to give it any attention.

121 X Q. 23. What grain drill manufacturers met with you and your attorneys at Dayton on the occasion above referred to?

A. I think P. P. Mast & Co., Thomas, Ludlow & Rodgers, of Springfield; Mr. Kuhns, of the Farmers' Friend Manufacturing Company, and Mr. McSherry, of Dayton; Stroger, of South Bend, and Mr. Lawrence, of the Wayne Agricultural Company, and I think there were several others, but as it has been about ten years since I would not like to say positively.

X Q. 24. Would the channel around the fluted seed wheel, as shown in the Moore patent, be of much or any value without the oblique discharge?

A. It would keep the fluted feed wheel from crushing the grain.

X Q. 25. There have been a great many improvements made in grain drills within the last ten years, have there not?

A. Yes; there have been a great many improvements in grain drills, but there have been but few improvements in grain-drill feeding devices.

X Q. 26. Why, then, are grain drills so much cheaper now than ten years ago?

A. Competition in business, improved machinery for manufacturing, and low prices for raw material.

122 X Q. 27. Which one of the members of the firm of Rude Brothers said you might go to hell?

A. George.

X Q. 28. Is he living now?

A. I think not.

X Q. 29. Was not Joseph Ingels president of the Hoosier Drill Company at one time?

A. I think not.

X Q. 30. What office did he hold?

A. He might have been a director, but that I could not say. He never held any office, to my knowledge.

X Q. 31. Did the Hoosier Drill Company ever pay any royalty under the Hiram Moore patent?

A. No, sir.

X Q. 32. Why, after you began the suit against the Rude Brothers, did you permit it to stand without prosecuting it for four years?

Objected to as irrelevant.

A. From the fact that I was very busy and have been all the time. There were times when I could have given it more attention, but then my attorneys were so engaged that they could not, and at other times when I was ready my attorneys reported that their attorneys were away from home or were engaged in some important suit; that they could not give it attention at the time. 123

X Q. 33. Who were the attorneys for the defense at the time referred to?

A. J. W. Conway and Stem & Peck.

X Q. 34. Can you name a single infringer who declined to settle or take license on account of the pendency of this suit?

A. Essler & Robiquet Manufacturing Company of Belleville, Ill., and the manufacturer named Gunlock, of the same place.

X Q. 35. Did they settle or take a license after the patents were sustained?

A. No. I have never had time to visit them since.

Redirect:

X Q. 36. Prior to the payment of the license fee for the three years mentioned in answer No. 21, did the Wayne Agricultural Company make payment for drills sold prior to the license?

A. They did.

J. M. WESTCOTT.

Circuit Court of the United States for the District of Indiana. In Equity.

J. M. Westcott *et al.*
vs. } No. 4314.
Squire B. Rude *et al.*

Before the master.

124 The defendant- will take notice that the complainant- will examine witnesses in this cause under the 67th rule in equity, as amended, at the law office of Wood & Boyd, in Cincinnati, in the county of Hamilton, in the State of Ohio, on Wednesday, the 14th day of January, 1885, beginning said examination at 2 o'clock p. m. of said day and continuing from day to day until completed.

WOOD & BOYD,
Solicitor- for Complainant-.

Received copy Jan. 12, 1885.

STEM & PECK,
Solicitors for Def'ts.

License.

This agreement, made this 5th day of March, 1875, between Hiram Moore, party of the first part, and P. P. Mast & Co., a body corporate, of Springfield, county of Clarke and State of Ohio, party of the second part, witnesseth:

That whereas letters patent of the United States for improvements in seeding machines were granted to the party of the first part, dated November the 20th, 1860, No. 30685, and extended November the 19th, 1874; also patent No. 31819, dated March 26th, 1861; and whereas the party of the second part is desirous of manufacturing grain drills and seeders containing one or
125 more claims in said patent improvement: Now, therefore, the parties have agreed as follows:

First. The party of the first part hereby licenses and empowers the party of the second part to manufacture, subject to the conditions hereinafter named, at their factory, in the town of Springfield, county of Clarke and State of Ohio, and in no other place or places, to the end of the term for which said letters patent were granted, grain drills and seeders containing one or more claims of the patented improvements, and to sell the same within the United States.

Second. The party of the second part agrees to make full and true returns to J. M. Westcott, attorney-in-fact for the party of the first part, verified as said attorney may desire, on the 5th day of March, A. D. 1875, of all drills or seeders containing any of said patented improvements manufactured by the party of the second part since the granting of said letters patents, and thereafter a like return for and during each year of the term of said patent upon the first day of July and January of each year of all drills or seeders containing any of said patented improvements manufactured
126 by the party of the second part since the last preceding return.

Third. The party of the second part agrees to pay to the said attorney of the party of the first part two dollars as a license fee upon every two-horse drill or seeder and the sum of one dollar on every one-horse drill or seeder manufactured by said party of the second part containing any of the patented improvements: Provided, That if the fee be paid upon the days provided herein for semi-annual returns or within ten days thereafter a discount of fifty per cent. shall be made from said fee for prompt payment.

Fourth. Upon a failure of the party of the second part to make returns or to make payment of license fees as herein provided for thirty days after the days herein named the party of the first part may terminate this license by serving a written notice upon the party of the second part, but the party of the second part shall not thereby be discharged from any liability to the party of the first part for any license fees due at the time of the service of said notice.

In witness whereof the parties above named, the said P. P. Mast & Co., by P. P. Mast, its president, have hereunto set their
127 hands the day and year above written.

HIRAM MOORE, [SEAL.]
By J. M. WESTCOTT,
His Attorney-in-Fact.
P. P. MAST & CO., [SEAL.]
Per P. P. MAST, *Pres't.*

STATE OF OHIO, } ss:
County of Hamilton, }

I, Robert Zahner, a notary public within and for said county, selected to act as special examiner under the 67th rule in equity, as amended, in the cause stated in the caption, do hereby certify that the foregoing examination was had pursuant to the annexed notice, at the office of Wood & Boyd, Cincinnati, Ohio, on the 14th day of January, 1885, at 2 o'clock p. m.

I further certify that at the said time and place I was attended by J. M. Westcott, a witness produced on behalf of the complainants, he being of sound mind and lawful age, and the said witness was, previously to the commencement of his deposition, by me cautioned and solemnly sworn to testify the truth, the whole truth, and nothing but the truth, and the deposition hereinbefore appearing 128 & 129 was by me reduced to writing in the presence of and read over by me to said witness, and was thereupon subscribed by him in my presence.

I further certify that I am not of counsel nor attorney nor relative of either of the parties to this cause nor in any manner interested in the result thereof.

In testimony whereof I have hereunto set my hand and affixed my seal of office this 15th day of January, 1885.

[SEAL.] ROBERT ZAHNER,
Notary Public, Hamilton County, Ohio.

130 Circuit Court of the United States for the District of Indiana.
In Equity.

JOHN M. WESTCOTT *et al.* }
vs. } No. 4314.
SQUIRE B. RUDE *et al.* }

Before the master.

The defendants will take notice that the complainants will examine witnesses in this cause, to be used before the master, at the office of Warrington and Matthews, in the city of Dayton, in the county of Montgomery, in the State of Ohio, on Saturday, the 3rd day of January, 1885, beginning said examination at 10 o'clock a. m. of said day and continuing from day to day until completed.

WOOD & BOYD,
Solicitors for Complainants.

Received copy Dec. 31, 1882.

STEM & PECK,
Solicitors for Def'ts.

Circuit Court of the United States for the District of Indiana. In Equity.

JOHN M. WESTCOTT *et al.*
vs. No. 4314.
SQUIRE B. RUDE *et al.*

Examination of witnesses on behalf of the complainants under the 67th rule in equity, as amended, pursuant to the annexed notice.

Present: Edward Boyd, Esq., for the complainant-, and —— ——, for the respondent-.

131 By request of parties it is ordered that the depositions be taken by question and answer.

WILLIAM H. LEFEVRE, a witness produced on behalf of the complainants, being first duly sworn, deposeth and saith, in answer to interrogatories propounded to him by EDWARD BOYD, Esq., of counsel for complainants, as follows:

Question 1. State your name, age, residence, and occupation.

Answer. William H. Lefevre; age, 47; residence, Dayton, Ohio; occupation, travelling agent for the Farmer's Friend Manufacturing Company. I am also a stockholder in said company.

Ques. 2. State your experience with the use and sale of grain drills.

Ans. 2. I used to use them on the farm, and have been travelling in the grain-drill trade between seven and eight years exhibiting and selling them at the fairs, which has made me familiar with nearly all the grain drills made. Before that I was engaged selling reapers — mowers, and came in contact with all the drills.

Ques. 3. What are the advantages in a force-feed grain drill of a space in the seed cup for the passage of the seed back of and under the seed wheel and terminating in an oblique discharge orifice, 132 when used in connection with a toothed or fluted seed-distributing cylinder? By "force feed" I mean one in which the grain is carried through the seed cup by a wheel up to and over an elevated discharge orifice.

Ans. 3. As the grain has to be carried up above the lowest point of the distributing cylinder in force feeds, the grain would be ground or injured were not such a space provided. The advantage due to the space therefore is that it enables the seed to be discharged uninjured, and I consider such passage-way absolutely essential to the successful operation of a force-feed drill. The advantage due to the oblique discharge is that the seed, as it is carried up by the flutes of the cylinder, flows in a continuous stream over the incline, and this is delivered evenly and regularly, whereas if the discharge was horizontal the load of each flute would be discharged in a bunch, which would be very objectionable, as it would not be planted evenly.

Ques. 4. What would be the difference in the price at which manufacture-s could sell two-horse grain drills which delivered the seed evenly and uninjured and others equally well made, but which was liable to grind and bunch the seed and deliver it unevenly?

133 Ans. 4. I think it would make a difference of from ten to twenty dollars in favor of the first.

Ques. 5. Since the introduction of force feeds what kind of a market has there been for slide or gravity feeds?

Ans. 5. Well, the market for slide or gravity feeds ceased about the time the force feeds were introduced. There is no market for them to speak of.

Question 6. Assuming that manufacturers had not the right to make grain drills having a passage around the distributing cylinder and an oblique discharge, as before described, what, in your opinion, would be a reasonable and fair royalty or license fee per drill for the privilege of making and selling two-horse drills with such a feed?

Ans. 6. It is not usual to pay as a royalty the full value of the improvement, because the manufacture- wishes to make a profit on that as well as the balance of the machines. I think about five dollars would be a proper amount to pay.

Question 7. You may answer questions 4 and 6 with reference to one-horse drills.

Ans. 7. Under the same state of assumed facts I would think that
the drill which distributed evenly and unbrokenly would
134 sell from five to ten dollars more than the other and that a
reasonable license fee for the privilege of making and selling
a drill which distributed evenly and unbrokenly would be from
two to three dollars.

Cross-examination by ARTHUR STEM, Esq.:

Ques. 8. Do you know when force feeds superceded what are called the slide or gravity feed?

Ans. 8. Not the exact date.

Ques. 9. How long have the Farmers' Friend Manufacturing Company been making grain drills?

Ans. 9. I don't exactly —. I think some twelve or fourteen years.

Ques. 10. Have they ever manufactured anything except force-feed drills?

Ans. 10. I don't think they have.

Ques. 11. Upon what do you estimate your calculations as to the value of the features for which you say a license fee of five dollars per drill would be a fair license?

Ans. 11. The force feed—the oblique opening—the space around the feed wheel.

Ques. 12. Why do you say that five dollars per drill would be a fair license fee?

Ans. 12. Because I think that is about what it would be worth to the manufacturer.

Ques. 13. Have you ever manufactured drills yourself?

Ans. 13. No, sir.

135 Ques. 14. Did you ever know of a manufacturer paying that price for the right to use those features?

Ans. 14. No, sir.

Ques. 15. There are many kinds of force-feed drills, are there not?

Ans. 15. I believe there are; yes, sir.

Ques. 16. There are force-feed drills in which the teeth for lifting the grain are placed on the side of the feed wheel instead of the peripher*at*ry or fluted wheel; are there not?

Ans. 16. Yes, sir.

Ques. 17. Have you ever made any experiments to ascertain whether the grain will not flow in a continuous stream and be evenly and regularly delivered when a straight opening is used instead of the oblique discharge?

Ans. 17. Yes, sir; I have.

Ques. 18. On what machine did you make such experiments?

Ans. 18. I might have said I seen the experiments made and also helped to make them on the Monarch, Triumph, Hoosier, Champion, and Baker and others that I don't think of; on the Buckeye.

Ques. 19. How were these experiments made?

Ans. 19. By putting grain in the hopper, turning the wheel, and watching the flow of grain.

Ques. 20. Which of them had straight discharge orifices and which not?

136 Ans. 20. The Monarch had a straight discharge. The Buckeye, I think, had also. The Hoosier and Champion had oblique. The Baker also had oblique.

Ques. 21. Did you ever try the experiment by cutting the orifice straight in a part of the seed cups and leaving it oblique in others on the same drill, when the rest of the feeding mechanism would be alike in all, to see whether there would be any difference in the flow of grain?

Ans. 21. No, sir.

Ques. 22. How many different manufacturers have been using the force feed embodying the principles you have described in answer 3 since you became acquainted with the business?

Ans. 22. I don't know, sir—the Hoosier, the Champion, and I think the Improved Indiana. The Champion is made by the Wayne Agricultural Company.

Ques. 23. The Farmers' Friend Company used a force feed, did they not?

Ans. 23. Yes, sir.

Ques. 24. Did it have those features?

Ans. 24. It didn't have the oblique opening.

Ques. 25. Didn't it have the channel under the feed wheel?

Ans. 25. Yes, sir.

Ques. 26. Did it deliver a steady stream of grain?

Ans. 26. I think it might have been steadier by using the oblique opening.

137 Ques. 27. How much less did it sell for in the market than the Hoosier and Champion drill?

Ans. 27. Our prices were about the same.

Ques. 28. Then it wouldn't have been worth five dollars a drill to the Farmers' Friend Company to have the privilege of using the oblique discharge?

Objected to as immaterial and irrelevant.

Ans. 28. Not except it might have been in the increased sales.

Ques. 29. Didn't the P. P. Mast & Co.'s drill have the oblique discharge and the channel underneath the seed wheel?

Ans. 29. I don't think it had the oblique discharge—it had the channel.

Ques. 30. How did it sell in the market as compared with the Hoosier & Champion and defendants' drill?

Ans. 30. Well, I don't know what number of drills they sold or what number the others sold, so I couldn't tell you anything about that. The prices were about the same. The prices were governed by a combination, and I don't know whether they made that style of drill before that or not.

Ques. 31. How did the prices of their drill compare with the others named before the combination referred to was made?

138 Ans. 31. Well, I think the prices were about the same. The object of that combination was to prevent cutting prices.

Ques. 32. Were the defendants ever in that combination?

Ans. 32. I don't think they were.

Ques. 33. How do the sales of drills of the Hoosier Drill Company and the Farmers' Friend Co. and the Wayne Agricultural Company and P. P. Mast & Co. compare in numbers for the past few years—since you have been familiar with the business?

Objected to as irrelevant.

Ans. 33. I think the Hoosier folks have had the largest trade. As to the others, I wouldn't know what to say.

Ques. 34. Does the Wayne Agricultural Company sell as many drills as either the Farmers' Friend Company or P. P. Mast & Co.?

Same objection.

Ans. 34. I don't know.

Ques. 35. What is your information on the subject?

Ans. 35. I haven't any information.

Ques. 36. How do you know, then, that the Hoosier Drill Company has the largest trade?

Ans. 36. I think it is handled more generally by the dealers in the territory in which I travel.

Ques. 37. In the territory in which you travel please state how the sales of the other three companies compare.

Ans. 37. Well, I don't think. I don't know; couldn't form an opinion.

139 Ques. 38. Can't you form any opinion as to whether the Champion or the Farmers' Friend M'n'f'g Co. are sold most in the territory in which you travel or whether their sales are about equal?

Ans. 38. I wouldn't attempt to say which was the greatest.

Ques. 39. Is the channel beneath the feed wheel in the Farmers' Friend Co. drill the same as the one shown in this patent, No. 30685?

Ans. 39. Well, I think it is, with the exception of the opening here.

Ques. 40. Has the Farmers' Friend Company ever paid any royalty for using that?

Ans. 40. I don't know that they have.

Ques. 41. Are not force-feed grain drills made without that passage or channel beneath the seed wheel indicated by the letter H in the drawing?

Ans. 41. I don't think it would be possible to make a successful one with a fluted wheel without the channel.

Ques. 42. Are all force feeds made with a fluted wheel?

Ans. 42. I don't know that they are. There are other styles of wheels that are called force feeds.

Ques. 43. In that other style of force feeds the channel beneath the wheel is not necessary to prevent the grain being crushed or broken, is it?

140 Objected to as irrelevant and because no description of the wheel is given.

Ans. 43. That would depend altogether on the style of the wheel.

WM. H. LEFEVRE.

HENRY B. THOMPSON, a witness produced on behalf of complainants, being first duly sworn, deposeth and saith, in answer to interrogatories propounded to him by EDWARD BOYD, Esq., as follows:

Question 1. State your name, age, residence, and occupation.

Ans. 1. Henry B. Thompson; age, 38; residence, Richmond, Indiana; occupation, traveling salesman for the Hoosier Drill Company.

Ques. 2. State your experience with the use and sale of grain drills.

Ans. 2. I have been engaged in the wholesale trade in grain drills to dealers in the implements trade, and exhibiting and selling on fair grounds for nine years, and being familiar with all the grain drills in use during that time—in the section of the country in which I traveled, in Indiana and Michigan.

Question 3. What are the advantages in a force-feed grain drill of
a space in the seed cup for the passage of the seed back of and under
the seed wheel and terminating in an oblique discharge ori-
141 fice, when used in connection with a toothed or fluted seed-
distributing cylinder? By a force feed I mean one in which
the grain is carried through the seed cup by a wheel up to and over
an elevated discharge orifice.

Ans. 3. The advantage is if there was no channel it would break or crack the grain, and a feed without the channel would be of little or no value. The advantage in an oblique discharge orifice is to get the benefit of two flutes at a time and run the grain in a more continuous stream than with a straight orifice.

Ques. 4. What would be the difference in price at which manufacturers could sell two-horse grain drills which delivered the seed evenly and uninjured and others equally well made but which was liable to grind and bunch the seed and deliver it unevenly?

Ans. 4. There would be no sale for a grain drill which would grind or crack the grain.

Ques. 5. Since the introduction of force feeds has there been any market for slide or gravity feeds within your experience?

Ans. 5. There has been but very little, if any.

142 Ques. 6. Assuming that manufacturers had not the right to make grain drills having a passage around the distributing cylinder and an oblique discharge as before described, what, in your opinion, would be a reasonable and fair royalty or license fee per drill for the privilege of making and selling two-horse drills with such a feed?

Ans. 6. I should consider that five dollars would be a reasonable license.

Ques. 7. Answer a similar question as to a one-horse drill.

Ans. 7. About two dollars and a half.

Cross-examination by ARTHUR STEM, Esq.:

X Ques. 8. How long have you been in the employ of the Hoosier Drill Company?

Ans. 8. Nine years.

X Ques. 9. During that time Mr. John M. Westcott has been president of that company, has he not?

Ans. 9. A greater portion of that time he has.

X Ques. 10. In answer five you say that since the introduction of force feeds there has been little or no sale for the slide or gravity feed. State as nearly as you can when these force feeds came into use and the slide or gravity feeds were superceded.

Ans. 10. Within my experience the drills that have been sold have been the force-feed drills.

143 X Ques. 11. Then you never have handled a slide or gravity feed drill?

Ans. 11. No, sir.

X Ques. 12. Has your entire experience in the sale of grain drills been with the Hoosier Drill Company?

Ans. 12. No, sir; I sold a few grain drills in a local way to farmers before I became connected with said company, in connection with other agricultural implements.

X Ques. 13. What is the usual selling price of such grain drills as you have referred to in your direct testimony?

Ans. 13. The drills that I have been selling are eight and nine hoe drills mostly. At the present time the retail price is from sixty to sixty-five dollars.

X Ques. 14. If there would be no sale for drills without the characteristics described in question 3, and drills made with those characteristics would sell for sixty or sixty-five dollars, why do you put the price of the privilege of making such drills at five dollars apiece?

Ans. 14. From the fact that the license is not intended to cover the full benefits. Of course, the manufacturer intends to make a profit over and above that upon the goods manufactured.

X Ques. 15. How did you arrive at your conclusion that five dollars per drill would be the value of a license to use the features described?

144 Ans. 15. From the fact that it would be fair recompense to the inventor for his patent.

X Ques. 16. Upon what do you base your estimate or calculations in arriving at the conclusion that five dollars per drill would be a fair license fee?

Ans. 16. From the fact that a manufacturer could pay that and sell the goods at present prices and make a profit on the goods.

X Ques. 17. Did you ever know a manufacturer to pay that price for the privilege of using those features described?

Ans. 17. I am not familiar with just what manufacturers have been paying.

X Ques. 18. Have you had any experience in the matter of granting licenses?

Ans. 18. No, sir.

X Ques. 19. Have you had any experience in the practical manufacture of grain drills?

Ans. 19. Not in the details.

X Ques. 20. Do you know when this class of drills, known as force feeds, first came into use?

Ans. 20. No, sir; they were in use since I have been in the trade.

X Ques. 21. Are all force feeds alike in the construction and arrangement of the cylinder or fee- wheel and feed cup?

Ans. 21. No, sir.

X Ques. 22. Have you seen any of the exhibits in this case illustrating the device used by the defendants?

145 Ans. 22. No, sir; I have not. This is the first time I have been a witness.

X Ques. 23. Have you ever seen a grain drill in which the feeding mechanism was constructed like that shown in the drawings of letters patent No. 30685, granted Hiram Moore November 20, 1860, which I now show you?

Ans. 23. Yes, sir; I have saw similar feed.

X Ques. 24. When and where?

Ans. 24. I have seen it since 1875, or about that time, at Milton, Indiana.

X Ques. 25. Do you know of any drills now manufactured containing such a feeding mechanism as shown in that patent?

Ans. 25. Yes, sir; that embodies some of those principles.

X Ques. 26. What would be the selling value of a grain drill constructed with a feed like that shown in the patent to-day compared with those you have heretofore described as selling at sixty or sixty-five dollars?

Ans. 26. Well, I should think, embodying those principles, there would be very little difference in the price from those I mentioned before.

X Ques. 27. What do you mean by embodying those principles?

Ans. 27. What I mean by embodying those principles is a force feed with a channel beneath the feed wheel with an oblique discharge opening.

146 X Ques. 28. Have you seen a machine or drill with a feeding device constructed like that drawing since 1875 or 1876?

Obj.—Objected to as immaterial.

Ans. 28. I saw one similar.

X Ques. 29. When and where?

Ans. 29. At Milton, Indiana, along in 1875.

X Ques. 30. Have you seen any since about that time?

Ans. 30. Yes, sir; I have seen them similar to that since that time I saw them at Milton. I saw them at a later date than that embodying some of these same principles.

X Ques. 31. Embodying some of these same principles is very indefinite, and I am not asking you that question, but when you last saw or knew of grain drills being made like the drawing in that patent.

Objected to as immaterial and irrelevant.

Ans. 31. I have saw as late as this fall and winter force feeds with the channel beneath the feed wheel, with an oblique discharge opening.

X Ques. 32. Question repeated.

Counsel for complainants requests defendants' counsel to define what he means by being constructed like the drawing, if he does not mean embodying the principles shown in the drawing.

147 Counsel for defendants states that the drawing represents the feeding mechanism of the grain drill, and his question is simply when the witness last saw the feeding mechanism in a grain drill like the drawing, without any reference to what the witness may consider the principles embodied.

Counsel for complainants repeats his last objection.

Ans. 32. I saw similar to this drawing; I saw them embodying some of the same principles as late as this fall and winter.

X Ques. 33. You say in answer 3 the advantage of an oblique orifice is to get the benefit of two flutes at a time. What do you mean by that?

Ans. 33. I mean by that that one of the flutes does not get through discharging grain until the other one commences.

X Ques. 34. What do you mean by flutes?

Ans. 34. Well, it is the scalping out between the cogs on the feed wheel.

X Ques. 35. Doesn't this feed wheel, with its scallops, revolve steadily and constantly when in operation?

Ans. 35. Yes, sir.

X Ques. 36. Please explain, then, how the oblique discharge gets the advantage of two flutes at a time.

Ans. 36. Well, before the first flute is through depositing the grain at the upper part of the oblique the second flute
148 commences depositing at the lower side of the oblique.

X Ques. 37. In the drawing the oblique discharge is shown to be V-shaped or the two lips come together at an angle. Suppose, instead of that, the discharge orifice was made with the lip or opening extending in a slanting direction clear across, would that give the same benefit of the two flutes at a time?

Ans. 37. The results would be about the same.

X Ques. 38. Doesn't the drawing show the feeding device arranged to discharge the grain from a single cup to two hoes or drill teeth?

Ans. 38. I don't know whether it does or not, not being fully familiar with drawings in all their details.

X Ques. 39. Did you ever see a grain drill with a feeding device constructed with a discharge in a V shape, like that shown in the drawing, provided with two channels carrying the grain down by the letters J J in the drawing?

Objected to as immaterial because its specification describing said drawing provides that the orifice may be made as shown in the drawing or it may be a single face oblique to the face of the cylinder teeth.

Ans. 39. I never saw it carried down to two hoes from one cup.

149 X Ques. 40. Have you read the specifications?

Ans. 40. No, sir; I have not read them.

X Ques. 41. How, then, do you know what are the principles involved in the construction shown in the drawing?

Ans. 41. I don't know positively whether it was intended to carry the grain into two hoes from one cup.

X Ques. 42. Did you ever see a grain drill with a feeding device constructed just like the drawing in this patent, without reference to the question whether the grain is fed to two hoes from one cup or not? In other words, with or without the conductors J J?

Ans. 42. I saw similar feed to this, from one cup feeding one hoe.

X Ques. 43. Aside from that it was exactly like the drawing, was it?

Ans. 43. I will not say that it was.

X Ques. 44. Have there not been a great many improvements and changes in the manufacture of grain drills in the last ten years?

Ans. 44. There has since I have been in the trade.

X Ques. 45. Mention some of them—all you think of.

Objected to as irrelevant.

Ans. 45. Changing of feed without changing of gear wheels by means of a lever, of both grain and grass seed, raising and
150 lowering the hoes by a lever and putting a pressure on the hoes by a lever—spring pressure—putting them down into hard ground. They are the important improvements.

X Ques. 46. How many have you named?
Ans. 46. It shows for itself.

X Ques. 47. There have been other minor improvements, have their not, in their construction?

Ans. 47. Yes, sir.

X Ques. 48. Have not these important improvements which you have described been patented?

Ans. 48. I presume they have.

X Ques. 49. What, in your opinion, would be the difference in the market value between a grain drill constructed with all these improvements and one without them?

Obj.—Objected to as irrelevant.

Ans. 49. I am not prepared to say.

X Ques. 50. Have you no opinion in the matter?

Ans. 50. I have.

X Ques. 51. Well, is your opinion that is asked for based upon your experience and knowledge of the trade?

Ans. 51. I am not prepared to say just how much more they would be worth.

X Ques. 52. Do you think you could sell drills without these improvements which you have mentioned in competition with the drills now made having them?

Ans. 52. I probably could, but not for as much money.

151 X Ques. 53. How much less would you have to take, in your opinion, for them in order to make sales?

Ans. 53. I am not prepared to say how much less.

X Ques. 54. You have an opinion on the matter, have you not?

Ans. 54. I have.

X Ques. 55. What is it?

Ans. 55. I am not prepared to state it.

X Ques. 56. Do you mean that you decline to give your opinion?

Ans. 56. I mean that I don't know how much less I would have to take for the goods without the improvements.

X Ques. 57. How much less do you think you would have to take?

Ans. 57. I am not prepared to answer that.

X Ques. 58. Have you any idea how much less the market price would be?

Ans. 58. No positive idea. I suppose it would make from ten to twelve dollars, at any rate, but it is hard to estimate.

Re-examination:

Ques. 59. Your company manufactures drills with spring-pressure hoes and others without them, does it not?

Ans. 59. Yes, sir.

Ques. 60. What is the difference in your list price between such drills otherwise alike?

152 Ans. 60. We usually get from two to four dollars more for the spring-pressure drill.

X Ques. 36. Please explain, then, how the oblique discharge gets the advantage of two flutes at a time.

Ans. 36. Well, before the first flute is through depositing the grain at the upper part of the oblique the second flute
148 commences depositing at the lower side of the oblique.

X Ques. 37. In the drawing the oblique discharge is shown to be V-shaped or the two lips come together at an angle. Suppose, instead of that, the discharge orifice was made with the lip or opening extending in a slanting direction clear across, would that give the same benefit of the two flutes at a time?

Ans. 37. The results would be about the same.

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Ans. 38. I don't know whether it does or not, not being fully familiar with drawings in all their details.

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Objected to as immaterial because its specification describing said drawing provides that the orifice may be made as shown in the drawing or it may be a single face oblique to the face of the cylinder teeth.

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X Ques. 42. Did you ever see a grain drill with a feeding device constructed just like the drawing in this patent, without reference to the question whether the grain is fed to two hoes from one cup or not? In other words, with or without the conductors J J?

Ans. 42. I saw similar feed to this, from one cup feeding one hoe.

X Ques. 43. Aside from that it was exactly like the drawing, was it?

Ans. 43. I will not say that it was.

X Ques. 44. Have there not been a great many improvements and changes in the manufacture of grain drills in the last ten years?

Ans. 44. There has since I have been in the trade.

X Ques. 45. Mention some of them—all you think of.

Objected to as irrelevant.

Ans. 45. Changing of feed without changing of gear wheels by means of a lever, of both grain and grass seed, raising and
150 lowering the hoes by a lever and putting a pressure on the hoes by a lever—spring pressure—putting them down into hard ground. They are the important improvements.

X Ques. 46. How many have you named?

Ans. 46. It shows for itself.

X Ques. 47. There have been other minor improvements, have the*ir* not, in their construction?

Ans. 47. Yes, sir.

X Ques. 48. Have not these important improvements which you have described been patented?

Ans. 48. I presume they have.

X Ques. 49. What, in your opinion, would be the difference in the market value between a grain drill constructed with all these improvements and one without them?

Obj.—Objected to as irrelevant.

Ans. 49. I am not prepared to say.

X Ques. 50. Have you no opinion in the matter?

Ans. 50. I have.

X Ques. 51. Well, is your opinion that is asked for based upon your experience and knowledge of the trade?

Ans. 51. I am not prepared to say just how much more they would be worth.

X Ques. 52. Do you think you could sell drills without these improvements which you have mentioned in competition with the drills now made having them?

Ans. 52. I probably could, but not for as much money.

151 X Ques. 53. How much less would you have to take, in your opinion, for them in order to make sales?

Ans. 53. I am not prepared to say how much less.

X Ques. 54. You have an opinion on the matter, have you not?

Ans. 54. I have.

X Ques. 55. What is it?

Ans. 55. I am not prepared to state it.

X Ques. 56. Do you mean that you decline to give your opinion?

Ans. 56. I mean that I don't know how much less I would have to take for the goods without the improvements.

X Ques. 57. How much less do you think you would have to take?

Ans. 57. I am not prepared to answer that.

X Ques. 58. Have you any idea how much less the market price would be?

Ans. 58. No positive idea. I suppose it would make from ten to twelve dollars, at any rate, but it is hard to estimate.

Re-examination:

Ques. 59. Your company manufactures drills with spring-pressure hoes and others without them, does it not?

Ans. 59. Yes, sir.

Ques. 60. What is the difference in your list price between such drills otherwise alike?

152 Ans. 60. We usually get from two to four dollars more for the spring-pressure drill.

Ques. 61. How do the present retail prices of ordinary drills compare with the prices nine years ago, or when you first sold drills?

Ans. 61. The prices at the present time are from twenty to twenty-five dollars less than then.

H. B. THOMPSON.

JOHN H. SHEARER, a witness produced on behalf of complainants, being first duly sworn, deposeth and saith, in answer to interrogatories propounded to him by EDWARD BOYD, Esq., as follows:

Ques. 1. State your name, age, residence, and occupation.

Ans. 1. John H. Shearer; am thirty-one years of age; I live in Dayton, Ohio; am travelling salesman for the Hoosier Drill Company.

Ques. 2. State your experience with the use and sale of grain drills.

Ans. 2. I lived on a farm until I was about twenty-one years of age, and had some experience in using grain drills with slide feed and also with agitation feed. My first experience in selling grain drills commenced in 1875, at which time I was in the employ 153 of a firm that handled three different kinds of drills, one of which used an agitation feed and the other two used feeding devices known as "force feed," employing a feed wheel revolving within a feed cup, which was constructed with a channel or space between the feed wheel and the inside a wall of the cup, which discharged the grain from the orifice, which was somewhat elevated from the lower part of the cup. I was in the employ of this firm for two seasons. My next experience with grain drills was in the fall of 1878, at which time I commenced travelling for the Hoosier Drill Company, and have continued in their employ until the present time, working in the same capacity.

Ques. 3. What are the advantages in a force-feed grain drill of a space in the seed cup for the passage of the seed back of and under the seed wheel and terminating in an oblique discharge orifice when used in connection with a toothed or fluted seed distributing cylinder? By "force feed" I mean one in which the grain is carried through the seed cup by a wheel up to and over an elevated discharge orifice.

Ans. 3. The advantage consists in permitting the flow of 154 grain from the throat of the cup to a discharge orifice without mashing or cracking the grain, which would be caused by the friction between the feed wheel and the back of the cup in the absence of such channel or space. The oblique discharge orifice permits an even and continuous discharge of that portion of grain that is carried or elevated by the fluted surface of the wheel by permitting the grain to flow or discharge from two of the flutes at the same time.

Ques. 4. What would be the difference in price at which manufacturers could sell two-horse grain drills which delivered the seed evenly and uninjured and others equally well made, but which was liable to grind and bunch the seed and deliver it unevenly?

Ans. 4. I think the difference would be fully as much as the price of the drill. It is my opinion that a drill could not be sold for any price that would grind or mash the grain or that would not feed the grain in a continuous stream.

Ques. 5. Since the introduction of force feeds has there been any market for slide or gravity feeds within your experience?

Ans. 5. Scarcely any.

155 Ques. 6. Assuming that manufacturers had not the right to make grain drills having a passage around the distributing cylinder and an oblique discharge as before described, what, in your opinion, would be a reasonable and fair royalty or license fee per drill for the privilege of making and selling two-horse drills with such a feed?

Ans. 6. I think that five or six dollars per drill would be a very reasonable royalty.

Ques. 7. Answer a similar question as to a one-horse drill.

Ans. 7. I think that the royalty on one-horse drills employing the same feeding device should be fully half as much as for two-horse drills.

Cross-examination by Arthur Stem, Esq.:

X Ques. 8. Are you familiar with the general run of prices and amount of sales of drills by the Farmers' Friend Co., Wayne Company, P. P. Mast & Co., and others in this section of the country?

Ans. 8. I am familiar with the run of prices to a certain extent, but as to amount of sales have nothing more than a general impression.

X Ques. 9. How do the prices for the drills made by these companies compare; is there much difference between them or are they all about the same?

156 Ans. 9. There is some variation, but perhaps not a great deal of difference on an average.

X Ques. 10. How about the prices of the Hoosier drills; is the average price materially different from that of the others?

Ans. 10. It is my experience the retail price of the Hoosier drill is more on an average in the territory that I am working than the prices of the other drills referred to.

X Ques. 11. So far as you can judge, does the Hoosier drill sell to the dealers, taking an average of the whole territory, for any more than the others?

Ans. 11. If the dealers' statements to me are correct they have been offered some of these drills for less money than they have paid us for the Hoosier drill.

X Ques. 12. Don't the dealers usually make such statements as that for the purpose of getting you to let them have the drills cheaper, in your opinion?

Ans. 12. Perhaps that is true in some cases.

X Ques. 13. To what do you attribute the fact that they sometimes claim that they pay more for the Hoosier drill than the others—that is, what advantage is there in your drill over the others mentioned that would affect its price?

Ans. 13. We claim various advantages, and dealers say that our drills sell more readily to the farmers and that it seems to give better general satisfaction.

157 X Ques. 14. What are some of the advantages referred to?

Obj.—Objected to as irrelevant.

Ans. 14. The most vital or essential feature of the grain drill is the feeding device, and we claim to have a feed more simply constructed than some of the others, and at the same time it affords better results by sowing the grain in a very even continuous stream without breaking or cracking the grain in sowing any quantity from its largest capacity down to the smallest amount per acre.

X Ques. 15. Why is your drill feed superior to the others in these respects; how does it differ from that of the Farmers' Friend or the others named?

Obj.—Objection repeated.

Ans. 15. It is much more simple in its construction than some of the others referred to, which would perhaps give nearly the same result so long as the feeding device remains properly adjusted, but they, being complicated and their accuracy depending upon adjustable features, are liable to get out of order and cause a variation in the amount of grain discharged from the different cups, while some of the others, being more similar in construction by not being 158 complicated, heretofore have been constructed with a horizontal discharge orifice instead of the oblique, such as is used on the Hoosier, and, everything else being equal, a feeding device with an oblique discharge orifice will distribute the grain much more evenly than one with the horizontal discharge orifice.

X Ques. 16. The Wayne Company drill feed is made with the channel beneath the feed wheel and an oblique discharge orifice, is it not?

Ans. 16. Yes.

X Ques. 17. Is not the superiority of the Hoosier drill over the Wayne Co. drill, for instance, owing to the nicety of the adjustment by which each seed cup in the same drill feeds the same amount of grain when adjusted to different quantities per acre?

Obj.—Objected to.

Ans. 17. That is one of the principal features.

X Ques. 18. Does the Wayne Company drill bring as large a price as the Farmers' Friend Co. drill?

Ans. 18. I don't think there is much difference in the prices. In the territory that I work the Farmers' Friend Company have a better class of customers than the Wayne Agricultural Company, owing to the popularity of the Farmers' Friend corn-planter, which they endeavor to sell along with the drill; and, further, the 159 drill made by the Wayne Company is not popular on account of being constructed in a shabby sort of a manner and their feeding device being somewhat complicated in construction, such as I have heretofore referred to.

X Ques. 19. Can you swear that the Hoosier Drill Company gets on an average one dollar per drill more than the Farmers' Friend Company or P. P. Mast & Co.?

Obj.—Objected to.

Ans. 19. I have good reasons to believe that the Hoosier drill sells for a dollar or more per drill on an average in my trade than the one you refer to.

X Ques. 20. Are your reasons the statements made you by the dealers?

Ans. 20. Partly.

X Ques. 21. What other reason have you?

Ans. 21. In some instances I have seen prices given which I regarded as being substantial evidence.

J. H. SHEARER.

STATE OF OHIO,
County of Montgomery, } *ss:*

I, George O. Warrington, a notary public within and for said county, selected to act as special examiner, under the 67th rule in
equity, as amended, in the cause stated in the caption, do
160 hereby certify that the foregoing examination was had, pursuant to the annexed notice, at the office of Warrington &
Matthews, in the city of Dayton, Ohio, on Saturday, January 3rd, 1885.

I further certify that at the said time and place I was attended by William H. Lefevre, Henry B. Thompson, and John H. Shearer, witnesses produced on behalf of the complainants, they being of sound mind and lawful age; and the said witnesses, previously to the commencement of their depositions by me, being duly cautioned and solemnly sworn to testify the truth, the whole truth, and nothing but the truth; and the depositions hereinbefore appearing were by me reduced to writing in the presence of and read over by me to said witnesses, with the exception of the direct examination of John H. Shearer, which by consent of counsel was reduced to writing by E. P. Matthews and were thereupon subscribed by them in my presence.

I further certify that I am not of counsel nor attorney nor relative of either of the parties to this cause, nor in any manner interested in the result thereof.

In testimony whereof I have hereunto set my hand and affixed my seal of office this 5th day of January, 1885.

[SEAL.] GEORGE O. WARRINGTON,
Notary Public in and for Montgomery County, Ohio.

161 In the Circuit Court of the United States for the District of Indiana. May Term, 1880.

JOHN M. WESTCOTT *et al.*
vs.
SQUIRE RUDE *et al.*
} Chancery. 4314.

Before the Honorable Walter Q. Gresham, judge.

MAY 14TH, 1880.

Come now the complainants, by S. A. Bowman, Esq., their solicitor, and upon his motion it is ordered that William Schlater, Esq., of the city of Richmond, State of Indiana, be, and he is hereby, appointed special examiner in chancery in the above-entitled cause, and is empowered to cause to come before him, at the office of H. C. Fox, Main street, in said city of Richmond, upon proper notice given to the defendants, the witnesses of the complainants, and to take their depositions in writing and return the same, duly certified, into this court, addressed to the clerk thereof at Indianapolis.

UNITED STATES OF AMERICA,
District of Indiana,
} *ss:*

I, Noble C. Butler, clerk of the circuit court of the United States for the district of Indiana, do hereby certify that the above
162 and foregoing is a full and true copy of an order in the cause of John M. Westcott *et al. vs.* Squire Rude *et al.*, No. 4314, as fully as the same appears of record in my office.

Witness my hand and the seal of said court, at Indianapolis, in said district, this 14th day of May, 1880.

[SEAL.] NOBLE C. BUTLER, *Clerk.*

Circuit Court of the United States for the District of Indiana.
In Equity.

JOHN M. WESTCOTT *et al.*
vs.
SQUIRE RUDE *et al.*
} 4314.

The respondents will take notice that the complainants will examine witnesses in this cause under the 67th rule in equity, as amended—names of witnesses are as follows: Jacob S. Moore, John M. Westcott, and others—at the law office of Henry C. Fox, Esq., No. 226 Main street, in the city of Richmond, Indiana, county of Wayne, on Saturday, the 12th day of June, 1880, beginning said examination at 10 o'clock in the morning of said day, and continuing from day to day until completed.

H. C. FOX,
Solicitor for Complainants.
WM. W. SCHLATER,
Special Examiner in Chancery.

163 *Original Notice.*

STATE OF INDIANA, } ss:
Union County, }

I, William M. Jarrell, sheriff of Union county, in the State of Indiana, makes oath and say that on Monday, the 7th day of June, 1880, I served a copy of the within notice on Squire Rude by reading to and in his hearing, and also on Joseph W. Conway, solicitor for the respondents, by reading to and in his hearing.

Sheriff cost-, $1.50.

W. M. JARRELL, *Sheriff.*

Subscribed and sworn to before me this 7th day of June, 1880.

[SEAL.] W. O. KEFFER,
Clerk Union Cir. Court.

In the Circuit Court of the United States for the District of Indiana.
In Equity.

JOHN M. WESTCOTT *et al.*
vs. } 4314.
SQUIRE RUDE *et al.*

To Jacob S. Moore, Boston township, Wayne county, Indiana:

You are hereby summoned to appear and testify as a witness in the above-entitled cause on Saturday, the 12th day of June, 1880, at 10 o'clock in the morning, at the law office of H. C. Fox, Esq., No. 226 Main street, in the city of Richmond, Wayne county, Indiana, on the part of the complainants, and herein fail not to. 164

Witness my name this 5th day of June, 1880.

WM. W. SCHLATER,
Special Examiner in Chancery.

STATE OF INDIANA, } ss:
Wayne County, }

On this 8th day of June, 1880, personally appeared before me, William W. Schlater, a notary public in and for the said county, S. Parker Page, of the city of Richmond, in the said county, and, being duly sworn, on oath says that on Tuesday, the 8th day of June, 1880, he served the within subpœna on the within-named Jacob S. Moore by reading to and in his hearing and leaving a copy of the same with him.

S. P. PAGE.

Subscribed and sworn to before me this 8th day of June, 1880.

[SEAL.] WM. W. SCHLATER,
Notary Public.

S. P. Page, 1.50.

Depositions of Jacob S. Moore and others witnesses taken before me, William W. Schlater, a notary public within and for the county of Wayne and State of Indiana, acting as special examiner under an appointment by the Honorable Walter Q. Gresham, judge of the circuit court of the United States for the district of Indiana, at the law office of Henry C. Fox, Esq., No. 226 Main street, in the city of Richmond, county of Wayne, State of Indiana, 165 pursuant to the notice hereto attached, to be used and read in evidence on behalf of the complainants in a case pending in the circuit court of the United States for the district of Indiana, wherein John M. Westcott *et al.* are complainants and Squire Rude and others are respondents, cause No. 4314.

SATURDAY MORNING, *June 12th*, 1880, at 10 o'clock.

Present on behalf of the complainants, John M. Westcott and Henry C. Fox, Esq., and on behalf of the defendants the respondent, Squire Rude, in person.

Complainants offer in evidence certified copies of letters patent of the United States for an improvement in seed drills granted to Hiram Moore, and dated November 20th, 1860, No. 30685, and marked "Complainants' Exhibit Moore Patent of 1860."

Complainants also offer in evidence copies of letters patent of the United States for improvements in seed drills granted to Hiram Moore, and dated March 26th, 1881, and numbered No. 815, and marked "Complainants' Exhibit Moore Patent of 1861."

Complainants also offer in evidence a certified copy of certificate of extension by the Commissioner of Patents of the United States of the letters patent granted to Hiram Moore, November 20th, 1860, No. 30685, and dated November 19th, 1860, and marked "Complainants' Exhibit Extension of Moore Patent."

Complainants also offer in evidence certified copy of the assignment by Hiram Moore to John M. Westcott and Charles W. West of the aforesaid letters patent marked, respectively, "Complainants' Exhibit Moore Patent of 1860 and Moore Patent of 1861," dated October 6th, 1874, and marked Complainants' Exhibit Moore Assignment."

166 Complainants also offer in evidence a written stipulation marked "Complainants' Exhibit Defendants' Admission."

Complainants' also offer in evidence a hopper with seed cups and driving shafts attached, marked "Complainants' Exhibit Defendants' Hopper with Seed Cups and Driving Shaft."

Jacob S. Moore, who was subpœnaed as a witness, appeared, but the taking of his deposition was dispensed with because of the respondents' admissions hereinbefore set out.

(1.) COMPLAINANTS' EXHIBIT MOORE PATENT, 1860. Wm. W. Schlater, Special Examiner.

DEPARTMENT OF THE INTERIOR,
UNITED STATES PATENT OFFICE.

To all persons to whom these presents shall come, Greeting:

This is to certify that the annexed is a true copy from the records of this office of the letters patent and certificate of extension granted Hiram Moore November 20th, 1860, No. 30685, for improvement in seed drills.

In testimony whereof I, E. M. Marble, Commissioner of Patents, have caused the seal of the Patent Office to be hereunto affixed this twenty-eighth day of May, in the year of our Lord one thousand eight hundred and eighty, and of the Independence of the United States the one hundred and fourth.

[SEAL.] E. M. MARBLE,
Commissioner.

167 No. 30685.

United States of America to all to whom these letters patent shall come:

Whereas Hiram Moore, of Brandon, Wisconsin, has alleged that he has invented a new and useful improvement in seed drills, which he states has not been known or used before his application, has made oath that he is a citizen of the United States; that he does verily believe that he is the original and first inventor or discoverer of the said improvement, and that the same hath not, to the best of his knowledge and belief, been previously known or used, has paid into the Treasury of the United States the sum of thirty dollars and presented a petition to the Commissioner of Patents signifying a desire of obtaining an exclusive property in the said improvoment and praying that a patent may be granted for that purpose:

These are, therefore, to grant, according to law, to the said Hiram Moore, his heirs, administrators, or assigns, for the term of fourteen years from the twentieth day of November, one thousand eight hundred and sixty, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, the said improvement, a description whereof is given in the words of the said Hiram Moore in the schedule hereto annexed, and is made part of these presents.

In testimony I have caused these letters to be made patent and the seal of the patent Office has been hereunto affixed.

168 Given under my hand, at the city of Washington, this twentieth day of November, in the year of our Lord one thousand eight hundred and sixty, and of the Independence of the United States of America the eighty-fifth.

[SEAL.] JACOB THOMPSON,
Secretary of the Interior.

Countersigned and sealed with the seal of the Patent Office.
PHILIP F. THOMAS,
Commissioner of Patents.

The schedule referred to in these letters patents and making part of the same.

To all whom it may concern:

Be it known that I, Hiram Moore, of Brandon, in the county of Fond du Lac and State of Wisconsin, have invented certain new and useful improvements in seeding machines, of which the following is a full, clear, and exact description, reference being had to the accompanying drawings, making part of this specification, in which—

Figure 1 represents a perspective view of so much of a seeding machine as is necessary to illustrate my said improvements.

Fig. 2 represents a longitudinal section through the centre of the distributing cylinder.

Fig. 3 represents a transverse section at the line H H of Fig. 2.

Fig. 4 represents a perspective view of the two parts of the
169 hopper detached and with the distributing cylinder removed,
showing the construction of the hopper.

Fig. 5 represents a perspective view of the distributing cylinder detached from the hopper, and

Fig. 6 represents an end view of the cylinder, with the driving shaft shown in section.

The object of my said improvements is the more evenly and equally to distribute the grain or seed to be sowed and to render the machine more simple and less liable to get out of order, and they relate particularly to that class of seeding machines in which a toothed distributing cylinder is used at the bottom of a seed box or hopper in order to distribute the grain or seed. They consist, first, in combining a conduit or passage for the grain arranged between the bottom of the hopper and the discharging orifice, with the oblique discharging orifice and the distributing cylinder; second, in combining separate bearings for the cylinders with a single bearing in the cylinder for the shaft in the manner hereinafter described.

By this means we obtain important advantages. The warping or twisting of the seed box is a fruitful source of trouble in machines of this class, for the hopper being rigidly fastened at the bottom of the seed box any warping or twisting of the latter will cause the hopper to change its position relative to the shaft, and if the cylinder be firmly fastened upon its shaft it will bind against the sides of the hopper and in its bearings, producing much friction and increasing the draught of the machine and its liability to get out of order.

170 By having the shaft-bearing in the cylinder larger than the shaft and short, the evil effects of a displacement of the cylinder will be obviated in great measure, as the axis of the cylinder need not be coincident or even parallel with the axis of the shaft, but may vary considerably from it without the cylinder binding upon the shaft, and the cylinder will still be controlled by the revolution of the shaft, the cylinder being retained in place within the hopper by its own independent bearings.

I am aware that distributing cylinders have before this been placed loosely upon shafts at the bottom of hoppers, but without separate bearings, so that they cannot retain their proper relative position within and to the hoppers, and consequently the flow of seed or grain is irregular and uneven.

Third. In giving to the cylinder a beveled bearing, the bevel inclining outwards from the hopper, as shown in the drawings.

By this arrangement I attain a very important advantage. Refuse, such as small pieces of straw, dirt, etc., which may be mixed with the grain and thrown into the hopper is very apt to become worked into and remain in bearings as usually constructed, thus greatly impeding the revolutions of the cylinder, causing friction in the bearings and increasing the draught of the machine. By using a bevel bearing, however, as shown, any dirt, &c., that may get into
the bearing does not tend to remain, but is almost immediately
171 worked out by gravitation and the revolving action of the
cylinder in its bearings and falls below the cylinder and is discharged with the seed.

As my improvements only relate to the distributing apparatus of a seeding machine, I deem it unnecessary to describe the other portions of the machine.

In the drawings, A A′ represent the lower portion of a hopper of a seeding machine; it may be made of brass or other suitable material, and a number of them may be arranged at the bottom of a seed box and attached to the frame of the machine in any usual or convenient way. This hopper I make in two sections, as shown in Fig. 4 of the drawings, in order the more easily and readily to remove and replace the cylinder and to enable the hopper to be constructed with more facility. These sections are retained in position when placed together by ribs or tongues B B′, arranged substantially as shown, which interlock and prevent any twisting apart of the sections. C represents the toothed distributing cylinder, retained in its position within the cylinder by its independant bearings, consisting of the bevel bearing D at one end and the bosses E E at the other. These bosses project from the inside of the hopper and the inner edge of the cylinder encircles and rests upon and revolves around them. The cylinder is made of a peculiar form, as shown, the narrow bearing F for the driving shaft G being formed within it, and the rest of the cylinder being hollowed out
to make it lighter and to allow of its having more
172 lateral play upon the shaft. This narrow bearing F is
made larger than the shaft to allow the latter to pass loosely through the cylinder, and thus it will be seen that hopper and cylinder can alter their position considerably with respect to the shaft, and still the cylinder will be controlled by the revolutions of the shaft and not bind upon it. H represents the conduit or passage for the grain or seed. It is arranged around the cylinder C, as shown, and as the cylinder revolves its teeth move the grain through the conduit to the oblique discharging orifice I I. This conduit H passes beyond the lowest point of the cylinder and then curves or inclines slightly upward, so that the grain cannot fall out from the conduit by gravitation, but must be moved, as it were, uphill before

it can reach the discharging orifice I I and be delivered into the duct J J.

As shown in the drawings, the grain is discharged first at the ends of the orifice and last at the middle, an equal and regular supply being delivered upon each side of the middle of the cylinder. The discharging orifice may have a double oblique face, as shown in the drawings, forming an angle at the middle, or it may be a simple face oblique to the face of the cylinder teeth. From the orifice the forked duct J J receives the grain and delivers it to coulter legs, by which it is deposited in the earth. Thus a single hopper and cylinder may be used to supply grain or seed to each pair of
coulters, whereby but half the number of hoppers and cylin-
173 ders become necessary. If preferred, however, a single duct
may be used, in which case it becomes necessary to have a
hopper and cylinder to each coulter. A side view of a coulter showing its position with respect to the hopper, cylinder, and duct is shown in Fig. 3. In sowing broadcast the coulters are to be dispensed with. I am aware that forked ducts have before this been used to convey the grain from the hopper and seed cylinder, and I therefore make no claim to the forked duct alone as of my invention.

The shaft G, passing loosely through all the cylinders, may be driven by gearing from the driving wheel, or *m*, any suitable or convenient way.

Having thus described the construction and operation of my improved distributing apparatus, what I claim therein as new, and desire to secure by letters patent, is—

First. I claim the conduit or passage H, arranged between the bottom of the hopper and the discharge, in combination with the oblique discharge I and the tooth-distributing cylinder C, substantially as described and for the purposes herein specified.

Second. I claim the combination of separate bearings of the cylinder with single shaft bearing on the cylinder, shorter than the cylinder and larger than the shaft, in the manner and for the purposes substantially as herein described.

Third. I claim a distributing cylinder for seeding machines having a beveled bearing, substantially in the manner and for the purposes herein specified.

174 In testimony whereof I have hereunto subscribed my name.

HIRAM MOORE.

Witnesses:

JOSEPH H. POST.
R. C. KELLEY.

(Here follows diagram marked p. 175.)

H. Moore,

Force-Feed Seed-Planter.

No. 30,685. Patented Nov. 20, 1860.

Fig. 4.

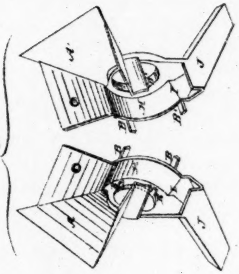


Fig. 5.

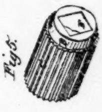


Fig. 6.

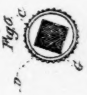


Fig. 2.

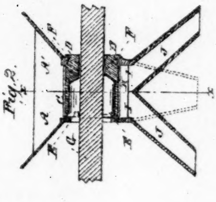
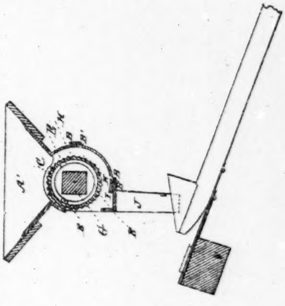
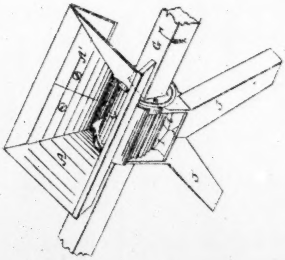


Fig. 3.



No. 187.
Rude et al.
v.
[illegible] } p. 175

Fig. 1.



Witnesses
A. Renwick Smedberg
[illegible] Johnson

Inventor.
Hiram Moore
by his Attorney
Presbury West

176 (3) COMPLAINANTS' EXHIBIT EXTENSION OF MOORE PATENT.
Wm. W. Schlater, Special Examiner.

Certificate of Extension.

Whereas, upon the petition of Hiram Moore, of Ripon, Wisconsin, for the extension of the patent granted to him November 20th, 1860, for an "improvement in seed drills," the undersigned, in accordance with the act of Congress approved the 8th day of July, 1870, entitled "An act to revise, consolidate, and amend the statutes relating to patents and copyrights," did, on this nineteenth day of November, 1874, decide that said patent ought to be extended:

Now, therefore, I, John M. Thacher, Commissioner of Patents, by virtue of the power vested in me by said act of Congress, do renew and extend the said patent and certify that the same is hereby extended for the term of seven years from and after the expiration of the first term, viz., from the fourth day of November, 1874, which certificate being duly entered of record in the Patent Office the said patent has now the same effect in law as though the same had been originally granted for the term of twenty-one years.

In testimony whereof I have caused the seal of the Patent Office to be hereunto affixed this ninteenth day of November, 1874, and of the Independence of the United States the ninety-ninth.

[L. S.] J. M. THACHER,
Commissioner.

Ex'd: H. M. H., E. A. M.

177 (2.) COMPLAINANTS' EXHIBIT "MOORE PATENT OF 1861."
Wm. W. Schlater, Special Examiner.

DEPARTMENT OF THE INTERIOR,
UNITED STATES PATENT OFFICE.

To all persons to whom these presents shall come, Greeting:

This is to certify that the annexed is a true copy from the records of this office of the letters patent granted Hiram Moore March 26th, 1861, No. 31819, for "improvement in seed drills."

In testimony whereof I, E. M. Marble, Commissioner of Patents, have caused the seal of the Patent Office to be hereunto affixed this twenty-eighth day of May, in the year of our Lord one thousand eight hundred and eighty, and of the Independence of the United States the one hundred and fourth.

[SEAL.] E. M. MARBLE,
Commissioner.

Whole No. 31819.

United States of America to all to whom these letters patent shall come:

Whereas Hiram Moore, of Fond du Lac, Wisconsin, has alleged that he has invented a new and useful improvement in seed drills, which he states has not been known or used before his application, has made oath that he is a citizen of the United States; that he does verily believe that he is the original and first inventor or discoverer of the said improvement, and that the same hath not, 178 to the best of his knowledge and belief, been previously known or used, has paid into the Treasury of the United States the sum of thirty dollars and presented a petition to the Commissioner of Patents signifying a desire of obtaining an exclusive property in the said improvement and praying that a patent may be granted for that purpose:

These are, therefore, to grant, according to law, to the said Hiram Moore, his heirs, administrators, or assigns, for the term of seventeen years from the twenty-eighth day of March, 1861, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, the said improvement, a description whereof is given in the words of the said Hiram Moore in the schedule hereto annexed, and is made part of these presents.

In testimony whereof I have caused these letters to be made patent, and the seal of the Patent Office has been hereunto affixed.

Given under my hand, at the city of Washington, this twenty-eighth day of March, in the year of our Lord one thousand eight hundred and sixty-one, and of the Independence of the United States of America the eighty-fifth.

[SEAL.] CALEB B. SMITH,
Secretary of the Interior.

Countersigned and sealed with the seal of the Patent Office.
S. T. SHUGERT,
Act'g Commissioner of Patents.

179 The schedule referred to in these letters patent and making part of the same.

To all whom it may concern:

Be it known that I, Hiram Moore, of Brandon, in the county of Fond du Lac and State of Wisconsin, have invented certain new and useful improvements in seed drills, of which the following is a full, clear, and exact description, reference being had to the accompanying drawings, making part of this specification, in which—

Figure 1 represents a top view or plan of my improved grain drill.

Fig. 2 represents a side elevation, the driving wheel being removed.

Fig. 3 represents a transverse section at the line *x x* of figure 1.

Fig. 4 represents a longitudinal section through two of the hoppers, etc.

Fig. 5 represents a horizontal section through the end of the seed box and bevel gearing, showing the arrangement for throwing in and out of gear.

My improvements relate more particularly to that class of seed drills in which the drills are so arranged as to drag behind the seed box and to form furrows for the seed by displacing the earth by pressure, and not by ploughing it up, as in most seeding machines is the case.

The object of my said improvements is, first, the more readily and easily to press the drills into the earth to any desirable depth, and at the same time have them free to rise separately in passing
180 over all obstructions, which often clog and sometimes break the drills now in common use, and also to raise them clear of the ground for convenience in backing the machine and in drawing it from place to place.

Second. The more conveniently to alter and regulate the amount of grain or seed to be sowed over a certain amount of land.

They consist, first, in a peculiar method of connecting the drills to the drill bar and main frame of the machine.

Second. In a simple or complex lever caused to operate upon all the drills simultaneously by means of a drill bar to which the lever and drills are all fastened, and through which they can be forced down to do their work or raised to any required height.

Third. In a peculiar arrangement of gearing upon the driving wheel, whereby the amount of grain to be sowed per acre is easily and readily regulated, as hereinafter described.

The construction of my improved seed drill is as follows: In the drawings A represents the main axle, carrying upon it the main supporting wheels B B′, the former of which is also the driving wheel. C represents the reach or perch by which the machine is connected to the front axle. It is firmly fastened to the middle of axle A and may be pivoted to the front axle by a ring bolt or in any convenient way. The horses may be attached directly to the perch if desired, but it will be found preferable to employ a forward
181 axle and wheels, with pole or shafts attached, as the horses then have not to support the weight of the machine, but merely that of the pole, while the machine is held more firmly in a forward direction.

The axle A I prefer to make of two planks set on edge in order to combine lightness and strength, and these planks are fastened firmly at each end to blocks D D′, the outer ends of which are fashioned into journals to receive the hubs of the wheels. Diagonal braces E E′ extend forward from the blocks D D′ which form the ends of the axle to the perch C, they being firmly fastened to both axle and perch. The main frame of the machine thus consists of the axle A, perch C, and diagonal braces E E′; but it may be constructed in any convenient form. Across perch and braces is arranged a long seed box, F, as usual in seeding machines, and in the bottom of this seed box are arranged hoppers G G, containing toothed distributing cylinders H H, operated by a long shaft I, common to all the cylinders and driven by gearing from the driving wheel, as hereinafter described.

These cylinders have separate bearings J J, so that if the shaft be removed they will still retain their respective positions in the hoppers, and the shaft passes loosely through them, so that it may not bind and can be taken out and one or more of the hoppers and cylinders removed for repairs, etc., without disturbing the position of the rest.

182 From the hoppers the grain is conducted through conduits K around the cylinders, and thence to the drills by means of forked ducts or funnels L L, whereby a single hopper is caused to supply grain to two or more drills. If preferred, however, a single funnel or duct may be used, in which event a hopper becomes necessary to every drill. Beneath the seed box and main frame is hung the drill bar M, which is hinged to the diagonal braces on a line with the lower ends of the hopper spouts by means of hinges, as at N. It may, however, be hung in any desirable manner to the under side of the main frame. To this drill bar are attached the drills O O, so arranged and formed as to drag or trail upon the ground in rear of the drill-bar without accumulating rubbish or becoming clogged.

There are hollow tubes as shown, *and* have a cutting shoe, P, the sides of which form a sharp angle at the lower point to enter the earth more readily. The shanks of these drills are attached to the drill bar M by spring connections Q Q, as shown, formed of steel or other suitable material, and these springs are rigidly attached at one end to the shank of the drill and at the other end rigidly to the drill bar for the threefold purpose, first, to prevent their moving laterally, that the seed may be planted in rows of equal distance apart.

Second. That the drills may be flexible up and down, and thus conform to any unevenness of the ground and move
183 over all rubbish and other obstructions which might otherwise break or clog them.

Third. That by the use of a lever common to them all the drills can be forced into or raised out of the ground simultaneously. The under side of the drill shanks are curved at their upper ends, as shown at R, in order to conform to the bend of the springs when the drills are pressed into the earth. The springs, thus having something to bear against, are less liable to break, have more tension, and are more apt to retain their elasticity. By means of these springs the drills, as above stated, when pressed down into the earth, are enabled, separately, to rise and fall, to pass over obstructions, without disturbing the rest, as shown by red lines in Fig. 2. Funnels S S are arranged upon the upper ends of the drills to receive the grain discharged from the hoppers through the ducts L L, and from them it passes into and down through the drill tubes and into the furrow formed by the shoe P. The arrangement for raising the drills and pressing them into the ground is as follows:

To the drill bar M near its center is firmly fastened a lever, T, composed of two arms united by a rod. A single arm may be used, but I prefer a double lever, as the strain is more equally distributed. To the rod joining these arms, or, if a single lever be used, to its outer end, is pivoted a link, U, whose upper end is pivoted to one arm of an L-shaped lever, V, pivoted at its elbow W to the
184 perch C of the machine, the upper end of V being within reach of the driver in his seat at X. Thus if the driver or

operator wishes to raise the drills clear of the ground he pulls the handle of the lever V towards him. The other end of V is elevated, turning upon the pivot or fulcrum W at its elbow, and draws up the link U, which raises the end of the arm T, attached to the drill bar.

Thus, as the arm T is rigidly fastened to the drill bar the latter must turn upon its hinges and raise the drills. The levers, drill bar, and drills will then be caused to assume the position shown by red lines in Fig. 3 and may be there retained by any suitable stop or catch. In the drawings a segment of a circle, Y, made of metal and having for its centre the pivot W, is shown fastened to the perch C between it and the lever V and pierced with a number of holes. A bracket, Z, upon the lever V clasps this segment and assists in retaining the *lower* in its upright position and close to the metal segment. This bracket has a hole in it corresponding in size and distance from the pivot W with the holes in the segment Y, and into this hole fits a pin or projection at the lower end of the rod *a*, which is bent as shown and pivoted at or near its centre to the lever V. A spring is arranged between the upper ends of lever V and rod *a* which presses the rod away from the lever, and consequently as the rod is pivoted to the lever the pin or projection at its lower
185 end is kept pressed into the hole in the bracket Z and into one of the holes in the metal segment X, thus retaining the lever V and consequently the drill bar and drills in any required position. If their position is to be altered the driver takes hold of the handles of both lever and rod and presses them together, thus throwing the retaining pin out of the hole in the segment. The lever is then moved until the pin comes opposite the desired hole in the segment. When the rod *a* is released the spring presses its upper end away from the lever V and thus throws the pin into the hole desired and the lever and drills are retained in their new position.

My improved arrangement of gearing to alter and regulate the amount of grain to be sowed per acre is as follows:

Upon the hub of one of the supporting wheels, as B, and inside the wheel I arrange a nest of helical gearing consisting of several series of spiral cogs, b b' b^2, of different pitch, whereby the ratio between the velocities of the pinion c and of the driving wheel B may be varied at pleasure. The pinion c may be moved and held in gear with one or other of these series of cogs in any convenient way.

I prefer to arrange it as shown in the drawings. The shaft d of the pinion c has bearings in a block, e, having a metal ear, f, fastened to it. Holes g g' g^2, corresponding in number to the number of series of spiral cogs upon the hub of the driving wheel, are bored in this metal ear. A universal joint in the shaft d, at h, allows the
186 pinion c to be shifted to one side or other in the arc of a circle. Thus, by means of a set screw, i, the metal ear f may be clamped fast to the diagonal brace E of the main frame and the pinion c held in gear with one or other of the series of cogs as desired. Any convenient number of these series of spiral cogs may be arranged upon the hub of the driving wheel. As the pitch is varied the number of cogs varies also. I prefer to arrange the first,

as b, with eight cogs, the second, b', with ten, the third, b^2, with twelve cogs, and so on.

This shaft (*j*) carries upon it the bevel pinion *k*, gearing with the bevel wheel *l* upon the cylinder shaft I, and it has a bearing in a sliding bar, *m*, which, by a suitable combination of levers, is caused to slide back and forth by the driver in his seat X, carrying with it the bevel pinion *k* and thus throwing it into and out of gear with the bevel wheel *l*. By thus throwing these bevel wheels out of gear the machine can be moved from place to place without operating the cylinders and consequently without disturbing any grain.

When the machine is to be used the seed box F is filled with grain or seed to be sowed. The amount to be sowed per acre is determined by setting the pinion *c* in gear with one or other of the series of spiral cogs b b' b^2 upon the hub of the driving wheel B. The bevel pinion *k* and bevel wheel *l* are thrown out of gear, and the drills are raised clear of the ground, by means of lever V, into
the position shown by red lines in Fig. 3, and the machine is
187 then ready to be drawn to the field. Upon arriving at the field
where the grain is to be sowed, the drills are lowered and pressed down by lever T to penetrate the surface of the ground to any desired depth, the bevel pinion *k* and wheel *l* are thrown into gear, and the machine is started. The cylinders H revolving move the grain through the conduits K to the funnels or ducts L L, and by them it is delivered to the drills O O and deposited in the furrows made by the drill shoes P.

Having thus described the construction and mode of operation of my improved grain drill, what I claim therein as new and desire to secure by letters patent is—

First. I claim the combination of a hinged drill bar, a series of rigid shank trailing drills, and a corresponding series of springs to connect the shanks and bar, so that by turning the latter the drills may be pressed with more or less force into the surface of the ground (as the ground is harder or softer or a deeper or shallower furrow is required), or may be lifted above the surface, substantially as described.

Second. I claim a series of trailing drills having rigid shanks connected to a hinged drill bar by springs that will resist lateral flexure to maintain the relative distances of the drills apart, while free to flex upward and downward to enable the drills severally to conform to uneven surfaces, substantially as described.

Third. I claim curves at the upper ends of the drill shanks,
188 as shown at R, in combination with the springs, substan-
tially as and for the purposes set forth.

Fourth. I claim a lever, in combination with the hinged drill bar, and a series of trailing drills connected to the bar by springs, the arrangement of these parts being such that by turning the lever all the drills will be simultaneously forced into the earth or raised therefrom, and when forced into the earth the shank of each drill throughout its entire length will still be left free to play up and down to the extent which the elasticity of the spring will permit to

H. Moore, 190

Seeding Machine,

No. 31,819, Patented Mar. 26, 1861.

No. 187.
Rude et al
Westcott et al } p. 190

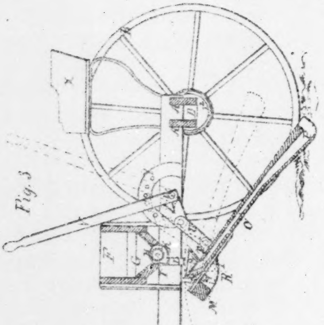


Fig. 3

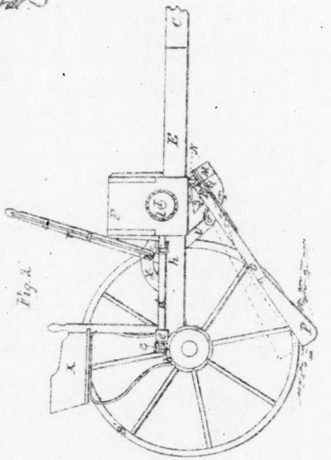


Fig. 2

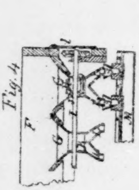


Fig. 4

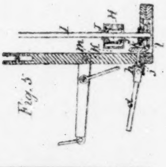


Fig. 5

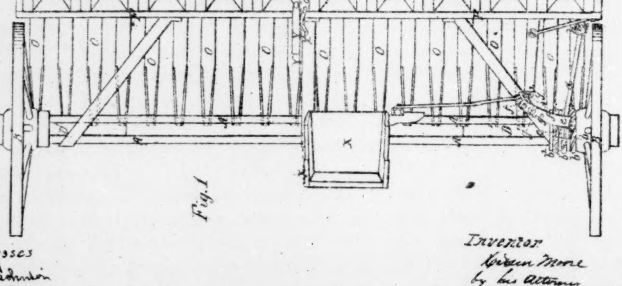


Fig. 1

Witnesses

Inventor
Hiram Moore
by his Attorney

allow the drill to pass over obstructions and to conform to inequalities of the surface, substantially as described.

Fifth. I claim arranging the mouths of the conduits on the drill shanks as nearly as may be in the line of the axis of motion of the hinged drill bar, so that raising and lowering the drills will change as little as may be the positions of the mouths of the conduits on the drill shanks relative to the positions of the lower ends of the hopper spouts, substantially as described.

Sixth. I claim the combination of a removable driving shaft with a series of seeding cylinders having independent bearings, whereby said shaft can at pleasure be removed to allow any of said cylinders to be taken out for repairs without displacing the rest, substantially as described.

Seventh. I claim a series of helical gear having teeth of varying number and pitch, in combination with a shifting pinion, for purposes substantially as described.

189 In testimony whereof I have hereunto subscribed my name.

HIRAM MOORE.

Witnesses:
JOSEPH H. POST.
R. C. KELLY.

Ex'd: C. F., L. M.

(Here follows diagram marked p. 190.)

191 (4.) COMPLAINANTS' EXHIBIT MOORE'S ASSIGNMENT. Wm. H. Schlater, Special Examiner.

DEPARTMENT OF THE INTERIOR,
UNITED STATES PATENT OFFICE.

To all persons to whom these presents shall come, Greeting:

This is to certify that the annexed is a true copy from the records of this office of an assignment recorded in Liber Q 18, page 269, and that said annexed copy has been compared by me with the original, and that it is a correct transcript therefrom and of the whole of the original.

In witness whereof I, E. M. Marble, Commissioner of Patents, have caused the seal of the Patent Office to be hereunto affixed this 28th day of May, A. D. 1880, and of the Independence of the United States the one hundred and fourth.

[SEAL.] E. M. MARBLE,
Commissioner.

192 Liber Q, p. 269.

This agreement, made this sixth day of October, A. D. 1874, by and between Hiram Moore, residing near Ripon, in the county of Fond du Lac and State of Wisconsin, party hereto of the first part, Charles W. West, of Cincinnati, in the county of Hamilton and State of Ohio, party of the second part, and John M. Westcott, of Milton, in the county of Wayne and State of Indiana, party hereto of the third part, witnesseth:

That whereas sundry letters patent of the United States heretofore have been granted to said Moore, which said letters patent are respectively numbered, entitled, and dated as follows, to wit:

No. 30685, dated November 20th, 1860, and entitled "improvement in seed drills," and No. 31819, dated March 26th, 1861, and entitled "improvement in seed drills;"

And whereas the said Moore is justly indebted unto the said Charles W. West in the full sum of ten thousand dollars for money advanced to aid him, the said Moore, in perfecting his inventions, and is desirous of securing the repayment of the same;

And whereas the said Westcott is desirous of acquiring an interest in the inventions and letters patent aforesaid and in any reissue, renewal, or extension thereof:

Now, therefore, know all men by these presents that for and in consideration of the premises and of the sum of five dollars, in lawful money, to me in hand (by the said West and Westcott before the execution hereof) paid, and of other valuable considerations me thereunto moving, I, the said Hiram Moore, do 193 hereby assign, sell, and set over unto the said Charles W. West and John M. Westcott the entire right, title, and interest in and to the letters patent aforesaid and in and to the invention and improvements represented, shown, or described therein, including any renewal, reissue, or extension thereof, the same to be held and enjoyed by the said West and Westcott and their legal representatives as fully and entirely as the same would have been held and enjoyed by me had this assignment and sale not been made to the full end of any term or terms for which the letters patent aforesaid or either of them have been or hereafter may be granted, reissued, renewed, or extended.

I hereby further agree to sign such lawful papers and do such lawful acts as may by the counsel learned in the law of the said West and Westcott be deemed necessary or expedient in order to obtain an extension or reissue of the patents aforesaid or to assert, maintain, or defend the rights secured by said letters patent. It is expressly understood, however, that the costs and charges of the proceedings aforesaid shall be defrayed by the said West and Westcott, as hereinafter provided.

In consideration of the premises I hereby further make, constitute, and appoint the aforesaid Charles W. West and John M. Westcott my true and lawful attorneys, in law and in fact, with power irrevocable, giving and granting to them full and exclusive and unreserved power and authority for me and in my name, place, 194 and stead to assume and take upon themselves the entire and exclusive management and control of the aforesaid letters patent and of each and every of them, and to dispose of all the rights, title, and interests which I have under the same and under each and every of them for such price or prices, upon such terms and to such persons, and for such place or places as they, my said attorneys, shall deem proper, and in my name, place, and stead and

as my own proper act and deed to sign, seal, deliver, and acknowledge all such deeds and instruments of writing as shall be necessary or proper for the granting or licensing to others the said rights under the said letters patent and to each and every of them, and to ask, demand, sue for, and receive the price or fees or any part or parts thereof paid or payable for such grants or licenses, and in my name to execute and deliver receipts and acquittances therefor, and in my name to bring to account and reckoning, and to ask, demand, sue for, and recover and receive of and from all and any person or persons whomsoever who may have been or may be manufacturing or selling seed drills containing the improvements aforesaid or by any or either of them such reasonable price or fee for such use of said improvements or either of them as my said attorneys shall deem proper and reasonable, and on receipt or recovery thereof, or of any part or parts thereof, to execute in my name such good and sufficient
receipts, releases, and discharges for the same as my said at-
195 torneys shall deem proper, and to liquidate and discharge
the same, and on the neglect or refusal of any such manufacturer or manufacturers as aforesaid lawfully to account for the use of said improvements or of any or either of them, and to pay such reasonable price or fee for such use, and to agree to pay a reasonable royalty therefor, or for the right to continue the use of said improvements or of any or either of them, to take all such legal ways and means for securing and enforcing the payment thereof or to stop the unauthorized use of said improvements or any or either of them by action, suit, or otherwise, as they, my said attorneys, may deem expedient, and in my name to prosecute, as they may deem expedient, all or any actions or suits, at law or in equity, or other proceedings before any tribunal against any person or persons brought by or under my said attorneys, and therein to proceed to judgment or to discontinue or to compromise the same as they, my said attorneys, shall deem expedient, hereby authorizing and empowering my said attorneys to substitute and appoint under themselves one or more special attorneys to do or perform any act, matter, or thing which they themselves might lawfully do by virtue hereof, and generally to do, perform, and execute in my name as aforesaid all and whatsoever other acts, matters, and things that they may deem expedient and requisite or may be advised to do in
and about the premises as fully and effectually to all intents
196 and purposes as if I myself were present and did the same, I,
the said Hiram Moore, hereby ratifying, allowing, and confirming and agreeing from time to time and all times hereafter to ratify, allow, and confirm as good and valid all and whatsoever the acts, matters, and things which my said attorneys, their substitutes, shall lawfully due or cause to be done in and about the premises by virtue of these presents.

And I, the said Hiram Moore, hereby covenant and agree with the said West and Westcott to do no act or thing to diminish the powers hereby conferred upon them or to hinder or embarrass them in the execution of this power, which is hereby intended and declared to be irrevocable. I hereby revoke, annul, and disallow any and all powers of attorney heretofore given by me in this behalf.

It is hereby agreed by and between the parties hereto that this agreement is to supersede and take the place of any heretofore made between said Moore and J. M. Westcott aforesaid, and that the entire right, title, and interest in the letters patent aforesaid has been, up to the execution of these instruments, vested in the said Hiram Moore.

The said John M. Westcott for his part agrees at his own costs and charges to procure the extension of said letters patent of Nov. 20th, 1860, now pending, if practicable, including the expenses
already incurred as well as those which hereafter may be
197 incurred in said behalf, which sum is to be paid absolutely,
whether said extension be granted or not, and in no event is
any part of said sum to be reclaimed from or refunded or repaid by said Moore or to be deducted from the sum or sums collected under said patent.

It is hereby covenanted and agreed by and between the parties hereto as follows: That from the sum or sums collected under the letters patent aforesaid from sales, royalties, or settlements or from any other source shall first be deducted the costs, charges, and expenses of collecting the same, including all litigation expenses, save those of the extension application, and then the net profits or receipts shall be divided among the parties hereto as follows: To Hiram Moore or his legal representatives, one-fourth part; to C. W. West or his legal representatives, one-fourth part; to John M. Westcott or his legal representatives, one-half part. In case of loss or failure to realize any profit under said patents all litigation or expenses aforesaid are to be paid by said Westcott, it being expressly understood by the parties hereto that under no circumstances are said Moore or West to incur any obligation or be under any liability for said expenses.

It is further agreed that John M. Westcott is to make no charge for his own time spent in this behalf, nor is said West to make any charge for his services. It is also expressly understood that said Moore's interest is to continue during and throughout the extended
term of the patent of Nov. 20th, 1860, should such extension
198 be granted.

The parties hereto hereby agree in good faith to perform the covenant between them made.

In testimony whereof the parties hereunto have affixed their hands and seals this day and year first above written.

HIRAM MOORE. [SEAL.]
C. W. WEST. [SEAL.]
J. M. WESTCOTT. [SEAL.]

Signed, sealed, and delivered in presence of—

WM. D. BALDWIN.
MARY F PALMER.

STATE OF WISCONSIN, }
County of Fond du Lac, } *ss:*

At Ripon, in said county, before me personally came, this seventh day of October, 1874, the above-named Hiram Moore and acknowledged the foregoing instrument to be his act and deed to the intent and for the purpose herein set forth.

In testimony whereof I hereunto subscribe my name and affix my notarial seal this seventh day of October, 1874.

[SEAL.] J. J. FOOTE,
Notary Public, Wisconsin.

Recorded Oct. 17th, 1874.
Ex'd: C. F., L. J.

199 (5.) COMPLAINANTS' EXHIBIT DEFENDANTS' ADMISSION. Wm. H. Schlater, Special Examiner.

United States Circuit Court for the District of Indiana. In Equity.

JOHN M. WESTCOTT *et al.* }
vs. } 4314.
SQUIRE RUDE *et al.* }

It is stipulated and admitted by the defendants in the above-entitled cause that the device marked "Complainants' Exhibit Defendants' Hopper with Seed Cups and Driving Shaft" is a correct representation of the hopper with seeding cups and driving shaft attached which the defendants have embodied in grain drills and seeding machines made by them at the town of Liberty, in the county of Union, in said district of Indiana, and sold by them at said town and elsewhere between the dates of each of the letters patent sued upon in this case and the bringing of this suit and further proof of the fact is waived.

RUDE BROTHERS.
SQUIRE B. RUDE,
For himself and JOHN R. RUDE AND
GEORGE W. RUDE,
Co-respondents.

200 UNITED STATES OF AMERICA, }
State of Indiana, County of Wayne, } *ss:*

I, William H. Schlater, a notary public in and for said county, appointed as a special examiner under the 67th rule in equity, as amended, in the cause stated in the caption to the annexed notice, do hereby certify that the foregoing examination was had, in pursuance of the annexed notice, at the law office of H. C. Fox, Esq., No. 226 Main street, in the city of Richmond, county of Wayne, State of Indiana, upon Saturday, the 12th day of June, 1880, at 10 o'clock a. m., both parties to this suit being represented.

I further certify that the complainants presented and offered in evidence the exhibits hereto attached, marked (1) Complainants' Exhibit "Moore Patent of 1860;" (2) Complainants' "Exhibit

Moore Patent of 1861;" (3) Complainants' Exhibit "Extension of Moore Patent;" (4) Complainants' Exhibit "Moore Assignment;" (5) Complainants' Exhibit "Defendants' Admission," and (6) Complainants' Exhibit "Defendants' Hopper with Seed Cups and Driving Shaft," which is also made part hereof.

I further certify that I am not of counsel nor attorney nor relative of either of the parties to this cause nor in any manner interested in the event of the same.

In testimony whereof I have hereunto set my hand and
201 affixed my notarial seal this 12th day of June, 1880.

[SEAL.] WM. H. SCHLATER,
Notary Public and Special Examiner.

Fees:

Jacob S. Moore, witness, $2.00, p'd by J. M. Westcott; Sh'ff Jarrell's fees, $1.50; S. P. Page, service subpœna, $1.50; Wm. H. Schlater, special examiner, $5.00; in all, $10, paid by John M. Westcott.

202 Law offices of Wood and Boyd, counselors in patent causes,
S. E. cor. Fourth and Main streets.

CINCINNATI, OHIO, *Feb'y 9th*, 1881.

Arthur Stem, Esq., city.

DEAR SIR: Mr. Westcott has informed us that you have served notice on him to take testimony in the Rude case on Saturday. He wants our Mr. Boyd to attend to it. Mr. Boyd does not expect to be home until Monday next, and it will be an accommodation to Mr. Boyd to postpone the notice to that time, and we think Mr. Boyd will accept notice to that effect on his return.

Please reply by bearer.

Yours truly, WOOD AND BOYD.
E.

United States Circuit Court, District of Indiana. In Equity.

JOHN M. WESTCOTT *et al.*
vs. } 4314.
SQUIRE RUDE *et al.*

Introduction of documentary evidence on behalf of the defendants under the 67th rule in equity, as amended, before Jeremiah
203 F. Twoleig, special examiner under said rule, at Cincinnati, Ohio, this fourteenth day of February, 1881.

Present: Edward Boyd, Esq., of the firm of Wood and Boyd, on behalf of the complainants, and Arthur Stem, Esq., of Stem and Peck, on behalf of the defendants.

Counsel for complainants objects to the character of the office abovenamed and to the introduction of any evidence at this time.

Counsel for defendants states that but for the negotiations looking to a settlement this testimony would have been offered some time since; that pending said negotiations one of the defendants, Mr. Westcott, stated that he was willing that at any time the defendants could go on at any time and take any testimony that they saw fit.

Counsel for defendants here offers in evidence a certified copy from the Patent —, at Washington, of an abstract of title of letters patent granted Hiram Moore November 20th, 1860, No. 30685, and of letters patent granted the same March 26th, 1861, No. 31819, and marks the same Defendants' "Exhibit Abstract of Title."

Counsel for complainants further objects to the same as incompetent for any purpose.

Counsel for defendants also offers in evidence a certified copy from the records of the Patent Office of the assignment of letters patent granted Hiram Moore November 20th, 1860, No. 30685, and letters
patent granted same March 26th, 1861, No. 31819, from
204 Hiram Moore to Chas. M. West and John M. Westcott, said
assignment being dated October 6th, 1874, and marks the same Defendants' "Exhibit Moore Assignment."

Counsel for defendants also offers in evidence certified copy from the records of the Patent Office of the assignment from John M. Westcott to Isaac Kinsey and Aaron Morris of an interest in the above-named letters patent dated November 10th, 1874, and marks the same "Defendants' Exhibit Westcott Assignment."

Counsel for defendants also offers in evidence certified copy from the records of the Patent Office of an assignment from Isaac Kinsey to Lovell L. Lawrence of Richmond, Indiana, and the Wayne Agricultural Company of an undivided one-twelfth interest in said letters patent dated February 4th, 1879, and marks the same "Defendant's Exhibit Kinsey Assignment."

STATE OF OHIO,
County of Hamilton, } *ss :*

I, Jeremiah F. Twoleig, a notary public in and for the above-named county and State, duly commissioned and qualified, and appointed special examiner in the above-entitled cause, do hereby certify that the foregoing documentary evidence was offered in the case before me on February 14th, 1881, on behalf of the defendants; that the complainants, by Edward Boyd, Esq., were present when
the same was offered; that the complainant, John M. West-
205 cott, was notified of the examination, but did not appear for
the reason expressed in the letter from Wood and Boyd, attached to this deposition.

I further certify that I am not counsel, attorney, or relative of either party or otherwise interested in the event of this suit.

Witness my hand and seal this 21st day of February, 1881.

[SEAL.] JEREMIAH F. TWOHIG,
Notary Public and Special Examiner Herein.

Defendants' Exhibits Westcott Assignment and Moore Assignment. J. F. Towlig, Spec'l Ex'er.

206 Department of the Interior,
United States Patent Office.

To all persons to whom these presents shall come, Greeting:

This is to certify that the annexed is a true copy from the records of this office of two (2) assignments recorded in the volumes as stated on the margin of each copy respectively, and that said annexed copies have been compared by me with the originals, and that they are correct transcripts thereof and of the whole of said originals.

In testimony whereof I, E. M. Marble, Commissioner of Patents, have caused the seal of the Patent Office to be hereunto affixed this fourth day of February, in the year of our Lord one thousand eight hundred and eighty-one, and of the Independence of the United States the one hundred and fifth.

[SEAL.]

E. M. MARBLE,
Commissioner.

Liber M 22, p. 374, D.

Whereas heretofore, to wit, Oct. 6th, 1874, Hiram Moore, of Fond du Lac county, Wisconsin; Charles W. West, of Cin., Ohio, and John M. Westcott, of Milton, Ind'a, entered into a contract and article of agreement in relation to certain improvements in grain drills, for which letters patent have been issued to said Moore,
207 No. 30685, dated Nov. 20th, 1860, and No. 31819, dated
March 26th, 1861, in which agreement, amongst other things, the said Moore assigns and conveys to said West one-fourth and to said Westcott one-half and retains for himself one-fourth of said interest contained in said letters patent for said improvements in said grain or seed drills. In said agreement said Westcott on his part agrees at his own cost and charges to procure the extension of said letters patent of Nov. 20th, 1860, including expenses already incurred, as well as those that may hereafter occur, in said behalf, to be paid whether said extension be granted or not, and in no event is said sum or any part thereof to be reclaimed from or refunded by said Moore, and that from sums collected under said letters patent from sales, royalties, or settlements or from any other source shall first be deducted the costs, charges, and expenses of collecting the same, including all litigation expenses save those of the extension application, and then the nett profits or receipts shall be divided among said parties—to said Moore one-fourth, said West one-fourth, and said Westcott one-half part. In case of loss or failure to realize any profit under said patents, all litiga-
208 tion expenses aforesaid are to be paid by said West-
cott, said Moore or West to be under no liabilities for said expenses. Said Westcott is to make no charge for his own time spent in this behalf, nor is said West to make any charge for his services. Said Moore's interest is to continue during and

throughout the extended term of the patent of Nov. 20th, 1860, should said extension be granted; and whereas, in consideration of the foregoing, Isaac Kinsey and Aaron Morris, of Milton, in Wayne county, Ind'a, are desirous of obtaining an interest in said letters patent, they hereby agree- to and with said John M. Westcott, of the same place, to severally take an equal interest with him in the same:

Therefore this article of agreement witnesseth: That said John M. Westcott hereby agrees to and with said Isaac Kinsey and Aaron Morris and does hereby set over and assign to each of them one-third part of his said one-half interest, retaining one-third part himself in said letters patent; and said Kinsey and Morris, fully understanding the original agreement mentioned, do hereby agree to and with said Westcott, jointly, as set forth in said agreement and shall be equally entitled —and receive one-third profit or proceeds,
209 if any, in said half interest and in all things pertaining hereto, to be governed by this and the original contract and agreement.

In witness whereof we have hereunto set our hands and affixed our seals this 10th day of Nov., 1874.

J. M. WESTCOTT. [SEAL.]
ISAAC KINSEY. [SEAL.]
AARON MORRIS. [SEAL.]

Recorded Feb. 4th, 1878.
Ex'd: E. A. M., L. J.

Liber Q 18, page 269.

This agreement, made this sixth day of October, anno Domini one thousand eight hundred and seventy-four, by and between Hiram Moore, residing near Ripon, in the county of Fond du Lac and State of Wisconsin, party hereto of the first part; Charles W. West, of Cincinnati, in the county of Hamilton and State of Ohio, party hereto of the second part, and John M. Westcott, of Milton, in the county of Wayne and State of Indiana, party hereto of the third part, witnesseth:

That whereas sundry letters patent of the United States heretofore have been granted to said Moore, which said letters patent are respectively numbered, entitled, and dated as follows, to wit: No. 30685, dated November 20th, 1860, and entitled "improvement in seed drills," and No. 31819, dated March 26th, 1861, and entitled "improvement in seed drills;"

210 And whereas the said Moore is justly indebted unto the said Charles W. West in the full sum of ten thousand dollars for money advanced to aid him, the said Moore, in perfecting his inventions and is desirous of securing the repayment of the same;

And whereas the said Westcott is desirous of acquiring an interest in the inventions and letters patent aforesaid and in any reissue, renewal, or extension thereof:

Now, therefore, know all men by these presents that, for and in consideration of the premises and of the sum of five dollars in lawful money to me in hand (by the said West and Westcott, before the

execution hereof) paid, and of other valuable considerations me thereunto moving, I, the said Hiram Moore, do hereby assign, sell, and set over unto the said Charles W. West and John M. Westcott the entire right, title, and interest in and to the letters patent aforesaid and in and to the invention and improvements represented, shown, or described therein, including any renewal, reissue, or extension thereof, the same to be held and enjoyed by the said West and Westcott and their legal representatives as fully and entirely as the same would have been held and enjoyed by me had this assignment
211 and sale not been made to the full end of any term or terms for which the letters patent aforesaid or either of them have been or hereafter may be granted, reissued, renewed, or extended.

I hereby further agree to sign such lawful papers and do such lawful acts as may, by the counsel learned in the law of the said West and Westcott, be deemed necessary or expedient in order to obtain an extension or reissue of the patent aforesaid or to assert, maintain, or defend the rights secured by said letters patent. It is expressly understood, however, that the costs and charges of the proceedings aforesaid shall be defrayed by the said West and Westcott, as hereinafter provided.

In consideration of the premises I hereby further make, constitute, and appoint the aforesaid Charles W. West and John M. Westcott my true and lawful attorney in law and in fact, with power irrevocable, giving and granting to them full and exclusive and unreserved power and authority for me and in my name, place, and stead to assume and take upon themselves the entire and exclusive management and control of the aforesaid letters patent and of each
212 and every of them, and to dispose of all the rights, title, and interests which I have under the same and under each and every of them for such price or prices, upon such terms and to such persons and for such place or places as they, my said attorneys, shall deem proper, and in my name, place, and stead, and as my own proper act and deed, to sign, seal, deliver, and acknowledge all such deeds and instruments of writing as shall be necessary or proper for the granting or licensing to others the said rights under the said letters patent and to each and every of them, and to ask, demand, sue for, and receive the price or fees or any part or parts thereof paid or payable for such grants or licenses, and in my name to execute and deliver receipts and acquittances therefor, and in my name to bring to account and reckoning and to ask, demand, sue for, and recover and receive of and from all and any person or persons whomsoever who may have been or may be manufacturing or selling seed drills containing the improvements aforesaid, or by any or either of them, such reasonable price or fee for such use of said improvements or either of them as my said attorneys shall
213 deem proper and reasonable, and on receipt or recovery thereof or of any part or parts thereof to execute in my name such good and sufficient receipts, releases, and discharges for the same as my said attorneys shall deem proper, and to liquidate and discharge the same, and on the neglect or refusal of any such manufacturer or manufacturers as aforesaid lawfully to account for the

use of said improvements or of any or either of them and to pay such reasonable prices or fee for such use and to agree to pay a reasonable royalty therefor, or for the right to continue the use of said improvements or of any or either of them, to take all such legal ways and means for securing and enforcing the payment thereof or to stop the unauthorized use of said improvements or any or either of them by action, suit, or otherwise, as they, my said attorneys, may deem expedient, and in my name to prosecute, as they may deem expedient, all or any actions or suits at law or in equity or other proceedings before any tribunal against any person or persons brought by or under my said attorneys, and therein to proceed to judgement or to discontinue or to compromise the same, as they,
my said attorneys, shall deem expedient, hereby authorizing
214 and empowering my said attorneys to substitute and appoint
under themselves one or more special attorneys to do or perform any act, matter, or thing which they themselves might lawfully do by virtue hereof, and generally to do, perform, and execute, in my name as aforesaid, all and whatsoever other acts, matters, and things that they may deem expedient and requisite or may be advised to do in and about the premises as fully and effectually, to all intents and purposes, as if I, myself, were present and did the same, I, the said Hiram Moore, hereby ratifying, allowing, and confirming and agreeing from time to time and all times hereafter to ratify, allow, and confirm as good and valid all and whatsoever the acts, matters, and things which my said attorneys or their substitutes shall lawfully do or cause to be done in and about the premises by virtue of these presents.

And I, the said Hiram Moore, hereby covenant and agree with the said West and Westcott to do no act or thing to diminish the powers hereby conferred upon them or to hinder or embarrass them in the execution of this power, which is hereby intended and declared to
be irrevocable.

215 I hereby revoke, annul, and disallow any and all powers of
attorney heretofore given by me in this behalf.

It is hereby agreed by and between the parties hereto that this agreement is to supersede and take the place of any heretofore made between said Moore and J. M. Westcott aforesaid, and that the entire right, title, and interest in the letters patent aforesaid has been, up to the execution of these instruments, vested in the said Hiram Moore.

The said John M. Westcott for his part agrees, at his own cost and charges, to procure the extension of said letters patent of Nov. 20, 1860, now pending, if practicable, including the expenses already incurred, as well as those which may hereafter be incurred in said behalf, which sum is to be paid absolutely whether said extension be granted or not, and in no event is any part of said sum to be reclaimed from or refunded or repaid by said Moore or to be deducted from the sum or sums collected under said patent.

It is hereby covenanted and agreed by and between the parties hereto as follows:

216 That from the sum or sums collected under the letters patent aforesaid from sales, royalties, or settlements, or from any other source, shall first be deducted the costs, charges, and expenses of collecting the same, including all litigation expenses save those of the extension application, and then the nett profits or receipts shall be divided among the parties hereto as follows: To Hiram Moore, or his legal representatives, one-fourth part; to C. W. West, or his legal representatives, one-fourth part; to John M. Westcott, or his legal representatives, one-half part. In case of loss or failure to realize any profit under said patents all litigation or expenses aforesaid are to be paid by said Westcott, it being expressly understood by the parties hereto that under no circumstances are said Moore or West to incur any obligation or be under any liability for said expenses.

It is further agreed that John M. Westcott is to make no charge for his own time spent in this behalf, nor is said West to make any charge for his service. It is also expressly understood that said Moore's interest is to continue during and throughout the 217 extended term of the patent of Nov. 20, 1860, should such extension be granted.

The parties hereto hereby agree in good faith to perform the covenant between them made.

In testimony whereof the parties hereunto have affixed their hands and seals this day and year first above written.

HIRAM MOORE. [SEAL.]
C. W. WEST. [SEAL.]
J. M. WESTCOTT. [SEAL.]

Signed, sealed, and delivered in presence of—
WM. D. BALDWIN.
MARY F. PALMER.

STATE OF WISCONSIN,
County of Fond du Lac, } *ss:*

At Ripon, in said county, before me personally came, this seventh day of October, A. D. 1874, the above-named Hiram Moore and acknowledged the foregoing instrument to be his act and deed to the intent and for the purpose herein set forth.

In testimony whereof I hereunto subscribe my name and affix my notarial seal this seventh day of October, A. D. 1874.

[SEAL.] J. J. FOOTE,
Notary Public, Wisconsin.

Recorded Oct. 17th, 1874.
Ex'd: H. M. H., E. A. M.

218 Circuit Court of the United States for the District of Indiana. In Equity. (Seal.)

John M. Westcott *et al.*
vs. No. 4314.
Squire B. Rude *et al.*

The complainants will take notice that the defendants will examine witnesses in the above-named cause, under the 67th rule in equity, as amended, before J. F. Twohig, Esq., special examiner, at the office of Stem & Peck, No. 75 West Fourth street, Cincinnati, Ohio, on Friday, the 25th day of March, 1881, beginning said examination at 10 o'clock a. m. of said day and continuing from day to day until completed.

STEM & PECK,
Solicitors for Def'ts.

Endorsed.

State of Indiana,
County of Wayne, *ss:*

On Wednesday, the twenty-third day of March, A. D. 1881, I served the within notice on John M. Westcott, one of the complainants herein, by delivering a copy of the same to said John M. Westcott personally.

C. B. WALKER.

Subscribed and sworn to before me this 22d day of March, A. D. 1881.

[seal.] SAMUEL A. FORKNER,
Notary Public.

219 Circuit Court of the United States for the District of Indiana. In Equity.

John M. Westcott *et al.*
vs. No. 4314.
Squire Rude *et al.*

Examination of witnesses on behalf of the defendants under the 67th rule in equity, as amended, pursuant to the annexed notice.

Present: Edward Boyd, of Wood & Boyd, for the complainants, and Arthur Stem, of Stem & Peck, for the defendants.

By request of parties it is ordered that these depositions be taken by question and answer.

Squire Rude, a witness produced on behalf of the defendants, being first duly sworn, deposeth and saith, in answer to interrogatories propounded to him by Arthur Stem, Esq., of counsel for the defendants, as follows:

Question 1. State your name, age, residence, and occupation.

Answer. My name is Squire B. Rude; I am 47 years of age; I reside in Liberty, Indiana, and by occupation am a manufacturer of agricultural implements.

Q. 2. State whether or not you are one of the defendants in this suit.

Ans. I am.

220 Q. 3. Please state whether you have seen and understood the construction of Complainants' Exhibits Rude's Seeding Device.

Ans. I have seen it. I am not positive that I understand it.

Q. 4. State how long it has been since you manufactured seeding machines like that exhibit.

Ans. I not being positive that I understand the exhibit, I will say not since 1876. As I am not positive that I understand the construction of that exhibit, we having made a number of different styles of drill, was the reason that I state that we have not to my knowledge made any since 1876.

Q. 5. You are sure, are you, that you have made none of that particular style of machine since 1876?

Objected to.

Ans. I am.

Q. 6. Have you a feeding device constructed like those now manufactured and sold by you? If so, please produce it.

Ans. I have, and here produce the same.

Counsel for defendants offers the same in evidence and marks the same "Rude's seed cup."

Q. 7. State how long you have been manufacturing seeding machines like this exhibit.

Ans. At least thirty days.

221 Ques. 8. State whether since you began manufacturing this machine you have manufactured or sold any other kind.

Ans. We have not.

Q. 9. State whether or not you intend to manufacture or sell any other kind.

Ans. We do not.

Q. 10. State whether within the past five or six years you have manufactured or sold any grain drills so constructed that the shaft could be removed at pleasure to allow any of the cylinders to be taken out for repairs without displacing the rest.

Objected to.

Ans. Not intentionally.

Q. 11. Do you know that you have done so unintentionally?

Ans. I do not know that we have.

Cross-examination by Edward Boyd, Esq., for complainants:

X Q. 1. Are you manufacturing seed cups for J. L. Gilchrist & Co., of Connersville, Ind?

Ans. We have been.

X Q. 2. When?

Ans. I could not tell you—back 20 or 30 days.

X Q. 3. Have you seen their circular describing the feed you made for them?

Ans. I have not.

X Q. 4. Was the feed like the Exhibit "Rude's Feed Cup?"

222 Ans. No, sir.

X Q. 5. What was the difference?

Ans. That cylinder was aimed to be the same size clear through; the mouth part of the same size as the corrugated part.

X Q. 6. How did the seed cups differ, if at all, from those you have been making for your own trade within the past month?

Ans. First and foremost, the Gilchrist feed cup on the right-hand side, when looking at it from the discharge orifice, is the same size as the circumference of the outer opening of the rosette. The Gilchrist cup was not lugged together, as shown in the exhibit. The orifice of discharge is higher on the right than on the left.

X Q. 7. How did the shaft bearings of the Gilchrist feed roll differ from Exhibit Rude's Seed Cup?

Ans. The difference was the bearing in the Gilchrist was at one end instead of both ends.

X Q. 8. You have stated that you have made a number of different styles of drills since 1876. Will you describe these with reference to the seed cups and feed roll and offer exhibits of the same, if you can?

223 Question objected to, not in cross-examination, and counsel states that, desiring to have at the examination the exhibit offered by the complainant-, he telegraphed to complainants' counsel, at Indianapolis, yesterday morning to send it down; that is has not arrived, and he has had no reply whatever.

Counsel for complainant- replies that long since defendants' counsel was informed that the exhibit referred to was in the hands of the clerk of the court and not under the control of complainants.

Ans. What I meant by that was that as we had made a number of different devices I did not think we had made any since 1876 like this exhibit offered by complainants in evidence. It would be difficult for me to describe the different styles of drills we made since 1876.

X Q. 9. Describe the one made for your own trade last year.

Ans. The one that we made for our own trade last year was unlike Exhibit Rude Seed Cup for the following reasons: 1st, the opening or orifice was higher on the right than on the left; 2nd, the cylinder or feed roll was cored out, allowing it to bear at one end on feed shaft, the opposite in the rozette.

224 X Q. 10. For how many seasons had you used the feeding device like that of last year's?

Last two questions objected to by defendants' counsel for the reason before stated.

Ans. I am unable to answer the question. Probably two or more.

X Q. 11. The casting for the Exhibit Rude Seed Cup before it was dressed had the orifice of discharge higher on the right than on the left, had it not?

Ans. That I am unable to say. I did not put this box together and did not send it. The way we are casting them now is as near like the exhibit as we can get them—just draft enough to get them out of the sand.

Re-examination:

R. Q. 1. Did you ever make any castings for J. L. Gilchrist & Co. prior to this season?

Ans. No, sir.

R. Q. 2. Have you ever shipped any castings for feeding devices to Gilchrist & Co?

Ans. We have not.

R. Q. 3. Do you, under your arrangement with Gilchrist & Co., make simply the iron-work for their drills, or do you put them up complete?

Ans. We put them up complete and ship in a "knockdown."

225 R. Q. 4. How many drills do you suppose you made during the time that you made a drill described in answer to cross-questions 11 and 12?

Question objected to.

Ans. I couldn't tell—not many.

Recross-examination:

R. X Q. 1. Do you ship the Gilchrist drills on orders received from them?

Ans. We do not. We build them a certain number of drills on contract.

R. X Q. 2. How are these to be shipped?

Ans. I said awhile ago in a "knockdown" shape.

R. X Q. 3. Upon whose order and to whom are they to be shipped?

Ans. To John L. Gilchrist, at whatever time he has room or sees proper to receive them. I mean by that that there is no specified time for shipping.

Re-examination:

R. Q. 1. Is it in your contract with Gilchrist that these drills shall have been put together or painted and finished?

Ans. No, sir.

R. Q. 2. Are they to be shipped, simply the iron and wood work, without having been put up at all?

Objected to as leading.

Ans. They are.

S. B. RUDE.

226 Also at the same time and place John L. Rite, a witness of lawfull age, being first duly sworn, deposes and says, in answer to interrogatories propounded to him by Arthur Stem, Esq., of counsel for defendants, as follows, to wit:

Q. 1. State your name, age, residence, and occupation.
Ans. My name is John L. Rite. I am 41 years of age. I reside in Brownsville, Union county, Indiana, and by occupation I am an inventor, and I am also connected with the firm of John L. Gilchrist & Co., Connersville, Ind.
Q. 2. State whether or not you are the inventor of the seeding device proposed to be manufactured by the firm of John L. Gilchrist & Co.

Objected to.

Ans. I am.
Q. 3. State whether that company has ever sold any seed drills of any kind.
Ans. None.
Q. 4. State whether they have received any orders for any.

Objected to.

Ans. None.
Q. 5. Had they ordered any machines made in accordance with your patent?

Objected to.

Ans. They ordered of Rude Bros., of Liberty, Ind., to make the iron-work of 100 ten-horse drills and the wood work in the
227 white (unpainted) for same.
Q. 6. Were these drills ever completed and delivered?
Ans. Part of the work has been delivered and part is still at the shops of Rude Bros., Liberty, Ind.
Q. 7. Have any of the seeding devices been delivered?
Ans. No, sir.
Q. 8. Why not?

Objected to.

Ans. Because they have not been made.
Q. 9. Why were they not made?

Objected to.

Ans. Because we intend to change the seeding device so it will not embrace any of the claim of the Moore patent of Nov. 20th, 1860.
Q. 10. Did you order Rude Bros. to stop the manufacture of the seeding devices?

Objected to.

Ans. I did. There ought to be an explanation to that answer.
Q. 11. Give the explanation.
Ans. Rude Bros. have varied the patterns several times for the

purpose of getting in proper shape, and last week they first got them in shape to make the castings, when I stopped them from making the seeding devices.

Q. 12. Have you devised the changes referred to in answer 9?

228 Objected to.

Ans. I have.

Q. 13. Describe the device to be put into those machines as changed.

Objected to.

Ans. The feed wheel will have the smooth and fluted portion of the same diameter with a bearing on each end of the feed wheel in which the shaft will operate, the bearings being similar in construction to that shown in Exhibit "Rude's Seed Cup," and the discharge orifice will be parallel to the ribs or arms upon the periphery of the feed wheel.

Cross-examination by Mr. BOYD:

Q. 14. You are the traveling salesman for John L. Gilchrist & Co., are you not?

Ans. I will be.

Q. 15. Have you one of the circulars issued by them relating to the drill they intend to manufacture?

Ans. The drill will be made as shown in the circular, with the exception of the feeding device, which will be changed as herein stated. I have the circular.

Q. 16. Please produce the circular, to be marked by the examiner "Gilchrist drill."

Ans. I here produce same and mark it "Complainants' Exhibit Gilchrist Drill."

Re-examination:

229 Q. 17. Does J. L. Gilchrist & Co. propose to manufacture their own drills aside from the 100 contracted for with Rude Bros.?

Ans. They do, with the exception of the iron work, which they propose to buy of Rude Bros.

Q. 18. What were those 100 drills ordered for?

Ans. As samples.

Q. 19. When will the new feed or seeding device probably be ready to put on?

Ans. Some time next week.

JOHN L. RITE.

STATE OF OHIO,
Hamilton County, } *ss:*

I, Jeremiah F. Twohig, a notary public in and for the county and State above named, duly commissioned and qualified, and appointed special examiner in the above-entitled cause to take testimony in behalf of the defendants, at Cincinnati, Ohio, do hereby certify that the above-named Squire B. Rude and John L. Rite were by me first severally sworn to testify the truth, the whole truth, and nothing but the truth, and that the depositions by them subscribed were reduced to writing by me in the presence of the witnesses, respectively, and subscribed by them in my presence and read over to them 230 & 231 before they signed the same; that I am not counsel, attorney, or relative of either party or otherwise interested in the event of this suit, and that said depositions were taken at the time and place specified in the notice hereto attached.

In testimony whereof I have hereunto set my hand and official seal this 8th day of April, A. D. 1881.

[SEAL.] JEREMIAH F. TWOHIG.

232 Circuit Court of the United States for the District of Indiana. In Equity. [Seal.]

JOHN M. WESTCOTT *et al.*
vs. } No. 4314.
SQUIRE RUDE *et al.*

The complainants will take notice that the defendants will examine witnesses in the above-named cause, under the 67th rule in equity, as amended, before J. F. Twohig, Esq., special examiner, at the office of Stem & Peck, No. 75 West Fourth street, Cincinnati, Ohio, on Friday, the first day of April, 1881, beginning said examination at 10 o'clock a. m. of said day, and continuing from day to day until completed.

STEM & PECK,
Solicitors for Def'ts.

Received copy M'ch 29, 1881.

WOOD & BOYD,
For Compl'ts.

Circuit Court of the United States for the District of Indiana. In Equity.

JOHN M. WESTCOTT *et al.*
vs. } No. 4314.
SQUIRE B. RUDE *et al.*

Examination of witnesses on behalf of the defendants, under the 67th rule in equity, as amended, pursuant to the annexed notice.

Present: Edward Boyd, of Wood & Boyd, for the complainants, and Arthur Stem, of Stem & Peck, for the defendants.

233 By request of parties it is ordered that these depositions be taken by question and answer.

SQUIRE B. RUDE, a witness produced on behalf of the defendants, being first duly sworn, deposeth and saith, in answer to interrogatories propounded to him by ARTHUR STEM, Esq., of counsel for defendants, as follows:

Question 1. State your name, age, residence, and occupation.

Answer. My name is Squire B. Rude; I am 47 years of age; I reside in Liberty, Union county, Indiana, and am by occupation a manufacturer of agricultural implements.

Q. 2. State whether the defendants have shipped to J. L. Gilchrist & Co., of Connersville, Indiana, any seed cups or seeding devices for grain drills.

Objected to because the witness has been fully examined in reference to this matter in his former deposition.

Ans. They have not.

Q. 3. State whether they are manufacturing any seeding devices for said Gilchrist & Co. under the contract referred to by you in your former depositions.

Same objection.

Ans. They are.

Q. 4. Have you one of the seeding devices being manufactured by the defendants for said Gilchrist & Co.? If so, please produce the same.

234 Ans. I have, and offer it in evidence as "Defendants' Exhibit Gilchrist Seed Cup."

Q. 5. State whether the defendants have supplied or will supply said Gilchrist with any seeding devices differing in any respect from this exhibit.

Ans. We have not supplied and will not supply them with any differing in any respect from the said exhibit.

Q. 6. Who got up the design for this Gilchrist seed cup so far as it contains anything novel?

Objected to as immaterial and because it does not appear that it contains any novel feature.

Ans. John L. Rite, I believe.

Cross-examination by EDWARD BOYD, Esq., for complainants:

Q. 7. The exhibit just offered has been made since you testified here a week ago to-day, has it not?

Ans. It has. The castings that compose exhibit were made this week.

Re-examination:

Q. 8. When were the patterns for the castings made?

Ans. I do not know. We were stopped building the style first furnished and furnished this pattern instead.

Q. 9. What do you mean by "style first furnished?"

235 Ans. I mean the particular form of seed cup furnished us as pattern when the contract was made.

S. B. RUDE.

Also at the same time and place JESSE P. FULGHAM, a witness produced in behalf of the defendants, who, being first duly sworn, deposes and says, in answer to interrogatories propounded to him by ARTHUR STEM, Esq., as follows, to wit:

Q. 1. State your name, age, residence, and occupation.

Ans. My name is Jesse P. Fulgham; I am 51 years of age; I reside in Richmond, Wayne county, Indiana, and am by occupation a designer and pattern-maker.

Q. 2. State whether you have had any opportunity of becoming familiar with the principles of mechanics, theoretically and practically, and more particularly with reference to the various forms and improvements in grain drills; and, if so, what.

Ans. I have had an experience of thirty years in machine shops as machinist, pattern-maker, and designer of improvements in agricultural implements, and for the past sixteen years have been engaged exclusively in manufacturing and designing improvements in grain drills.

Q. 3. State whether or not you are familiar with the invention described and claimed in letters patent No. 30685 granted Hiram Moore Nov. 20th, 1860, for improvements in seeding machines.

236 Ans. I am.

Q. 3. Please look at Defendants' "Exhibit Rude Seed Cup," and state whether the same, in your opinion, infringes any of the claims of said letters patent, and give your reasons for any opinion you may express.

Objected to as incompetent and immaterial and improper at this stage of the proceedings.

Ans. In my opinion this exhibit does not infringe the first claim of the patent referred to, for the reason that it has no oblique discharge orifice, which is one of the elements of the combination in said first claim. Further, it does not infringe the second claim of said patent, for the reason that it has not the separate bearings within the cup for the cylinder, one end of said cylinder having its bearing directly on and being supported within the cup by the shaft instead of being supported on the cup; and, further, that it has not a shaft bearing within the cylinder shorter than the cylinder, which are two of the elements in the combination making the second claim. It does not infringe the third claim of said patent, for the reason that the cylinder has no beviled bearing within or upon the cup, as described in the third claim of said patent.

237 Answer objected to by complainants' counsel as incompetent.

Q. 4. Please answer the same question with reference to the Gilchrist cup, and give your reasons for any opinion you may express.

Objection to last question repeated by complainants' counsel.

Ans. This cup (the Gilchrist) does not, in my opinion, infringe on any of the claims in *in* the said patent of Hiram Moore, noted above, for the same reasons given in my previous answer.

Objection to third answer repeated as to the above.

Q. 5. To what class of drill feeds do these Exhibits Rude Cup and Gilchrist Cup belong?

Objected to as immaterial.

Ans. They both belong to the class of adjustable force feeds.

Q. 6. Please explain a little more fully what you mean by "adjustable," & state what are the essential characteristics of said class.

Same objection.

Ans. I mean by "adjustable" that class of feeds in which the quantity of grain sown is regulated by sliding a fluted or ribbed cylinder or feed wheel through one side of the cup or sliding a hollow cylinder or ring over the ribs of said wheel, thereby exposing to a greater or less extent the ribs or teeth of the cylinder to 238 the grain within the cup, said cup having a large converging channel behind the cylinder from the hopper bottom to the bottom of the feed wheel, and from which point the grain is elevated to the discharge orifice.

Q. 7. In this class of feeds, to which Exhibits Rude's Seed Cup and Gilchrist Cup belong, what means or devices are necessary in order to shift the fluted wheel in and out through the side of the cup to increase or diminish its feeding capacity?

Objection repeated.

Ans. In the best feeds of this class a scalloped or toothed ring is placed in the side of the cup through which the wheel slides to prevent the egress of grain, though in some specimens of this class a hollow cylinder is provided, sliding over the wheel, said wheel being held stationary in the opposite side of the cup, and in others a ring is carried over the flutes or ribs of the feed wheel or cylinder, and in still others the wheel passes into a chamber in one side of the cup.

Q. 8. In feeds of this class is it necessary to change the speed of the driving shaft in order to sow a greater or less amount of grain?

Ans. It is not—the change being made by exposing a greater or less portion of the rib or toothed feed wheel or cylinder to the 239 grain within the cup.

Q. 9. What class of feeds is shown and described in the Moore patent above referred to?

Ans. The non-adjustable gravity feed, in which the quantity is changed by rotating the cylinders or feed wheels at a greater or less speed.

Q. 10. Referring once more to Exhibits "Rude Seed Cup and Gilchrist Cup," what is the practical length of bearing of the fluted feeding cylinder upon the shaft, with reference to the length of said fluted portion?

Last objection repeated.

Ans. When feeding at its greatest capacity the practical bearing of the wheel upon the shaft is at least one-half the length of the cylinder, increasing as its capacity is diminished or as the wheel is slid out through the side of the cup, until at its smallest capacity the practical bearing of the wheel is entirely on the feed shaft.

Counsel for the complainants objects to the witness being coaxed to give a further answer to the question, it having been read to him several times and he having answered off the record several times
that according to his understanding of the question his answer
240 is correct, notwithstanding being told by the counsel for def'ts
that he did not seem — understand the question.

Answer continued. In other words, the practical bearing of the cylinder on the shaft is as above stated, but the shaft bearing within the cylinder & its hub or sleeve is double the length of the cylinder.

JESSE P. FULGHAM.

Adjourned till 10 a. m. to-morrow, April 2nd, 1881.

J. F. TWOHIG, *Examiner.*

April 2nd, 1881—10 a. m.

Met pursuant to adjournment.

Same parties present as before, and the examination is further adjourned till Monday morning next, April 4, 10 o'clock.

Counsel for complainants objected to the adjournment.

J. F. TWOHIG, *Examiner.*

Monday, *Apr.* 4, 1881—2 p. m.

Parties met.

Isaac Kinsey, a witness produced and sworn in behalf of the defendants, deposes and says, in answer to interrogatories propounded to him by Arthur Stem, Esq., as follows, to wit:

Q. 1. State your name, age, residence, and occupation.

Ans. My name is Isaac Kinsey. I am 59 years of age. I
241 reside in Milton, Indiana, and by occupation I am a farmer,
and engaged in other business besides.

Q. 2. I now show you defendants' exhibit, being an assignment of an interest in letters patent granted Hiram Moore from J. M. Westcott to Isaac Kinsey and Aaron Morris, & ask you if you are the Isaac Kinsey named therein.

Ans. I am.

Q. 3. Please state the circumstances under which this contract and assignment was made.

Objected to.

Ans. In the fall of 1874 John M. Westcott was treasurer, Aaron Morris superintendent, and I was president of the Hoosier Drill Company, manufacturing drills at Milton, Wayne county, Indiana. We learned that Hiram Moore, of Wisconsin, had a patent for seeding purposes, for use in grain drills, that was thought to be valuable. We consulted together and arranged for J. M. Westcott to visit Moore and see what arrangements he could make with Moore for this patent for the Hoosier Drill Company. Westcott went for that purpose and reported to us that he had made arrangements for the Hoosier Drill Company to own and control one-half of it. In a short time he returned to Wisconsin to have the papers 242 properly executed so that the company could make their arrangements accordingly. On his return, much to our surprise, he had the papers made out in his own name, and told us that Moore preferred to take him to the company, but that he was willing to assign to Morris and myself one-third of the one-half which he held, one-sixth being my proportion of the patent. Soon after he did so, the contract being—Moore, one-fourth; C. W. West, of Cincinnati, one-fourth, and J. M. Westcott one-half of the patent assigned from Moore.

Answer objected to by complainants' counsel.

Q. 4. You say in your last answer, "Soon after he did so." State what he did.

Objected to, it already being in evidence that what he did was in writing.

Ans. He had the assignments drawn up and we three signed it.

Q. 5. Is this assignment exhibit the assignment drawn up and signed by you three?

Ans. This is the one.

Q. 6. Had you at that time full confidence in Mr. Westcott and did you or not entrust this matter entirely to him?

Ans. Yes.

Q. 7. What did you understand from Mr. Westcott was to be conveyed to you by this assignment?

243 Objected to for incompetency.

Ans. That I was to have one-third of his half of the patent.

Q. 8. Did you consult an attorney about the assignment or did you take Mr. Westcott's word for what it conveyed?

Ans. We left the matter entirely with Mr. Westcott.

Q. 9. Who paid the expenses of Westcott when he went up to Wisconsin and bought the interest in this patent?

Ans. It was our understanding that the Hoosier Drill Company paid it, as they paid all expenses that were incurred by the company.

Q. 10. Has Westcott ever paid any of the royalties collected under these patents to you or to Mr. Morris?

Ans. He has not.

Answer objected to as hearsay.

Q. 11. Have ever any royalties been collected by Westcott?

Ans. Yes.

Q. 12. State whether West or Moore have ever received any portion of these royalties, so far as you know.

Objected to as calling for hearsay.

Ans. It is my understanding that Moore or his heirs have received seven hundred dollars and Charles W. West, of Cincinnati, the same amount.

244 Q. 13. Has the Hoosier Drill Company ever paid any royalties under this patent, so far as you know?

Objected to as immaterial and because witness does not appear to have any means of knowing.

Ans. I think not.

Q. 14. When did your connection with the Hoosier Drill Company cease, and who is now its president?

Ans. In the fall of 1876. John M. Westcott is president at this time.

Adjourned till 10 o'clock to-morrow morning, April 5th, 1881.

J. F. TWOHIG, *Examiner.*

APR. 5TH, 1881—10 o'clock a. m.

Met pursuant to adjournment.

Same parties present as before.

Cross-examination by EDWARD BOYD, Esq., counsel for complainants:

Q. 15. Mr. Kinley, will you please sign your deposition?

Ans. I will.

Redirect examination:

Objected to, as there cannot be any redirect where there is no cross examination.

Q. 16. Please state whether or not you sold any part of your interest in the Moore patents; &, if so, to whom you sold them.

245 Ans. I sold one-half of my interest in the Moore patents to L. L. Laurence, president of the Wayne Light Co. of Richmond, Indiana.

Objected to by complainants as not being the best evidence and being incompetent and immaterial.

ISAAC KINSEY.

Subscribed in my presence this 5th day of April, A. D. 1881.

J. F. TWOHIG, *Examiner.*

Also at the same time and place CHARLES W. WEST, a witness produced on behalf of the defendants, being first duly affirmed, deposes and says, in answer to interrogatories propounded to him by ARTHUR STEM, Esq., as follows, to wit:

Q. 1. State your name, age, residence, and occupation.

Ans. My name is Charles W. West; I am 70 years; I reside in Cincinnati, Ohio, and am out of business.

Q. 2. State whether or not you went to Wisconsin in the year 1874 to meet Mr. Westcott, to negotiate with Hiram Moore for the purchase of his patents on seed drills.

Ans. I was in Wisconsin that year & I met him there.

Q. 3. Did you and Mr. Westcott at that time buy certain interests in the Hiram Moore patents?

246 Ans. Mr. Moore conveyed to Mr. Westcott & myself an interest in those patents—to myself one-fourth and to Mr. Westcott one-half. I suppose the document itself will show the facts about it.

Answer objected to as not being the best evidence.

Q. 4. Whom did you understand at that time that Mr. Westcott was buying the half of the patent for, or for whom was he acting, as you understood it?

Question objected to because, 1st, it does not appear that Mr. Westcott bought a half interest in the patents, and, 2nd, because the witness' understanding is not competent, but should state the facts.

Ans. I understood that Mr. Westcott was acting for the Hoosier Drill Co. of Milton, Indiana.

Q. 5. State whether during the negotiations or conversations with you Mr. Westcott so informed you.

Objected to as calling for a conclusion instead of the facts of the conversation.

Ans. I can't state that definitely, but that was the impression I got at that time from the conversations with Mr. Westcott and Mr. Moore.

Q. 6. State whether or not, at or about that time, you sent to Milton, Indiana, to make any enquiries or investigations about the character and standing of the men who composed the Hoosier Drill Company.

247 Ans. My impression is that I wrote to a friend in Dublin, Indiana, but previous to this time.

Q. 7. State whether you have ever received any money as your share of the royalties collected under these Moore patents; &, if so, how much.

Objected to as immaterial and irrelevant.

Ans. Yes, sir; I have; five hundred dollars at one time and two hundred dollars at another time.

Q. 8. State whether you remember having signed the bill of complaint in this suit of Westcott and West against the Rude Brothers.

Objected to as irrelevant and immaterial and as not being the best testimony.

Ans. Well, I don't recollect. I may have done so. Mr. Westcott and myself talked about the suit, but I don't recollect.

Cross-examination waived.

C. W. WEST.

C. W. WEST recalled in the afternoon.

The counsel for compl'ts was notified, but declined to attend.

—. Please state what the consideration given for your one-fourth interest in the Moore patents was.

Ans. Ten thousand dollars.

248 Q. Did the assignment to you from Moore cancel all indebtedness from Moore to you?

Ans. Yes. C. W. WEST.

STATE OF OHIO,
Hamilton County, } *ss:*

I, Jeremiah F. Twohig, a notary public in and for the county and State above named, duly commissioned and qualified and appointed special examiner in the above-entitled cause to take testimony on behalf of the defendants in Cincinnati, Ohio, do hereby certify that the above-named Squire B. Rude, Jesse P. Fulgham, Isaac Kinsey, and Charles W. West were by me first severally sworn (the said Kinsey being affirmed) to testify the truth, the whole truth, and nothing but the truth, and that the depositions by them subscribed, as above set forth, were reduced to writing by me in the presence of the witnesses, respectively, and were subscribed by the said witnesses in my presence and read over to them respectively before they signed the same, and were continued from day to day as above set forth; that I am not counsel, attorney, or relative of either party or otherwise interested in the event of this suit, and that said depositions were taken at the time and place specified in the notice hereto attached.

249 In testimony whereof I have hereunto set my hand and official seal this 8th day of April, 1881.

[SEAL.] JEREMIAH F. TWOHIG.

250 In the Circuit Court of the United States for the District of Indiana. In Chancery.

JOHN M. WESTCOTT *et al.*, Pl'ffs,
vs.
WAYNE AGRICULTURAL COMPANY *et al.*, Def'ts. } No. 7266.

Testimony taken December the 2nd, A. D. 1881, on the part of the complainant- in the above-entitled cause, at the business office of Henry Reinstedler, No. 1124 Broadway, in the city of St. Louis and State of Missouri, by Andrew M. Sullivan, special examiner in chancery, appointed by the United States circuit court for the district of Indiana to take testimony in said cause in pursuance of the notice and order of said court hereto attached.

Present: Henry C. Fox, Esq., counsel for complainants, and Arthur Stem, Esq., counsel for defendants.

HENRY REINSTEDLER, being by me duly sworn, testified as follows, to wit:

Direct examination by HENRY C. FOX, Esq.:

Ques. 1. What is your name, age, residence, and place of business?

A. Henry Reinstedler; aged thirty-eight; I live at St. Louis, Missouri, and my place of business is No. 1124 Broadway.

Q. 2. What is your occupation?

251 A. Merchant, engaged in the sale of farm machinery.

Q. 3. Are you acquainted with a firm of Rude Bros., engaged in manufactory of wheat and corn drills at the town of Liberty, Indiana?

A. Yes, sir.

Q. 4. Have they an agent in the city of St. Louis, Missouri; and, if so, who is he, if you know?

A. H. Reinstedler—myself.

Q. 5. Have you a business house in the city of St. Louis? And, if so, give the number and street.

A. Yes; Nos. 1124 to 1128 Broadway.

Q. 6. How long have you been acting as the agent of said Rude Bros. in St. Louis?

A. I have been their agent since January, A. D. 1878.

Q. 7. What line of goods have you been engaged in selling for them?

A. Wheat drills, corn drills, and cultivators.

Q. 8. Are these drills known by any name in the market; if so, what is it?

A. Yes; the "Improved Indiana;" they have always been known as such since I have been acting as agent.

Q. 9. How many kinds of seed drills have you handled for them since you have been agent?

252 A. Two kinds—one and two horse.

Q. 10. Have they or have they had any other agent in Illinois that you are aware of since you have been acting as their agent?

A. None.

Q. 11. Can you state when you received your first consignment of seed drills from the Rude Bros.?

A. In March, 1879, A. D.

Q. 12. Were they one or two horse drills, or both?

A. They were two-horse drills.

Q. 13. Can you by referring to your books, or from memory, state the number of consignments of drills made to you by Rude Bros. in 1879?

A. Five or six.

Q. 14. Give the date of each consignment and the number and kind of drills in each consignment.

A. I cannot tell that without referring to my invoice books, and it will take me several hours to look them up.

Q. 15. Will you permit me to have an inspection of your books as far as your accounts or statements with the Rude Bros. are concerned, for the purpose of ascertaining what they show with regard to the number of one and two horse drills that have been
253 consigned to you by the said Rude Bros. in each of the years A. D. 1879, 1880, and 1881, respectively?

A. I have no objections.

Q. 16. Will you exhibit to me the entries and memoranda made with regard to your business with the Rude Bros.?

A. I will so soon as my book-keeper can make the examinations.

Q. 17. While that examination is being made, I will ask you to state whether you know Rude Bros. had an agent in this city prior to your appointment in 1879, of which you have spoken?

A. I do not know whether they did or not. I think I introduced their drill here in 1879.

Q. 18. What has been since 1879 and what is now the extent of your agency for them, with respect to territory?

(Objected — by defendants' counsel as irrelevant and immaterial.)

A. In 1879 I had all of Missouri and Southern Illinois; in 1880 I had the same territory, with the exception of two tiers of counties in Western Missouri; in 1881 I had the same territory as in 1880.

Q. 19. What portion of the State of Illinois do you include in the expression of the southern part?

A. South of the Vandalia railroad.

254 Q. 20. In furnishing goods received of the Rude Bros. to purchasers throughout the territory of which you have spoken as being covered by your agency, did they pass through your house here in St. Louis and were they delivered by you directly?

A. They did, and were delivered by me directly; my books will show the goods.

Q. 21. Did you order consignments to different parts of your territory direct from the Rude Bros.?

A. Yes, sir; in several cases. I sold parties a half a car-load of goods to several parties on the same line of road, and in that case I booked the order and shipped the same to one of the parties, charging the same upon the books and keeping the account of them myself and letting the first consignee distribute the goods to the others.

Q. 22. You may now state if you can give the numbers of each consignment of drills made to you in 1879; if so, you may state the number.

A. I can. March 18th, 1879, one two-horse drill; April 12, 1879, thirty-eight drills; May 15, 1879, thirty-eight drills; July 15, 1879, thirty-eight drills; Aug. 1, 1879, thirty-eight drills; August 27, 1879, thirty-six drills; Sept. 13, 1879, thirty-two drills.
255 All above, viz., 211 drills, were two-horse drills.

Ques. 23. State the number consigned to you in 1880.

A. February 14th, one drill; April 6, nineteen drills; April 10th, forty-two drills; May 22nd, forty-two drills; June 2nd, forty-three drills; June 26th, forty-two drills; August 9th, thirty-two drills; August 23rd, forty-three drills; September 10th, forty-two drills; September 15th, forty-two drills; October 1st, one drill; October 4th, two drills. These were all the two-horse drills, viz., three hundred and fifty-one, received in 1880. The following are all the one-horse drills received in 1880, viz: August 3rd, twelve drills; August 9th, 18 drills; September 7th, four drills; September 9th, five drills; making a total of thirty-nine one-horse drills received in 1880.

Q. 24. State the number received in 1881.

A. I have not examined the books for this, but I have received about three hundred in 1881.

Here plaintiffs' counsel hands to witness plaintiffs' exhibit marked by me "Plaintiffs' Exhibit Seed Cup A 1," and propounds the following question:

Q. 25. I will ask you to examine this exhibit and state if you know what it is.

256 A. It is a feed cup for a one-horse drill.

Q. 26. You may state if the one-horse drills which you received from the Rude Bros. of which you have spoken had seed cups attached like this.

A. I can't say that they had.

Q. 27. Can you say that they had not?

A. That I can't say.

Q. 28. What idea do you intend to convey when you say that you can or cannot say whether the one-horse drills you received from Rude Bros. had or had not seed cups similar to this?

A. I did not examine the one-horse drills to see what kind of seed cups they had on them, and hence don't know.

Q. 29. How many of the drills you received in 1881 were one-horse drills?

A. About sixty-five, and the balance were two-horse drills.

Plaintiffs' counsel here hands to witness an exhibit which I have marked "Plaintiffs' Exhibit Seed Cup B No. 1," and propounds the following question:

Q. 30. Now, I would like for you to examine this exhibit and state if you know what it is.

A. It is a feed cup for an Improved Indiana two-horse drill.

257 Q. 31. Were similar seed cups used upon all the two-horse drills consigned to you by the Rude Bros., of which you have spoken?

A. No, sir; they were not. In 1879 and 1880 the drills used this feed cup like the Exhibit "B No. 1."

Q. 32. How did those differ from the feed cups used upon the drills in the year 1881 on the two-horse drills?

A. Part of the two-horse drills of 1881 used a seed cup in which the discharge orifice ran square across instead of obliquely. I have noticed the difference also with respect to the bearing of the feed roll upon the driving shaft, but cannot describe it accurately.

Q. 33. What proportion of the two-horse drills received by you in 1881 had seed cups like exhibit marked "seed cup B No. 1?"

A. Probably from one hundred and twenty to one hundred and twenty-five.

Q. 34. In what consignments in 1881 did you receive the drills referred to in your last answer?

A. In the three first consignments.

Q. 35. When did you first receive drills containing seed cups like those of exhibit marked "Defendants' Exhibit Seed Cup B No 2?"

A. There was one sample drill in the third consignment of the year 1881. I think the balance were like Defendants' Exhibit B No. 2.

258 Q. 36. Had all the two-horse drills that you had received prior to the third consignment from the Rude Bros. in the year 1881 seed cups like exhibit marked "Plaintiffs' Exhibit Seed Cup B No. 1?"

A. They had.

Cross-examination by A. STEM, Esq., counsel for defendants:

Cross-ques. Strictly speaking, are you the agent of the Rude Bros. or are you simply a dealer in farm machinery who buys wherever he sees fit?

(Objected to as irrelevant and as calling for a conclusion of the witness and not a statement of facts by plaintiffs' counsel.)

A. I am simply a dealer in farm machinery.

Cross-Q. Are you able to say whether the one-horse drills bought by you had seed cups like Exhibits "A No. 1" or "A No. 2?"

(Objected to by plaintiff- because it neither contradicts or explains anything in witness'es examination-in-chief.)

A. I cannot tell anything about it.

C. Q. As a practical and experienced dealer in farm machinery, is there any particular advantage in constructing the seed cup and feed wheel like the one shown in "Exhibit A 1" over the construction shown in A "No. 2?"

259 (Objected to by plaintiff- because irrelevant and not pertinent to any issue before the master for the purpose for which this testimony is being taken and no proper foundation laid to show the competency of the witness.)

A. I don't think there is.

C. Q. Can you sell one just as readily and for just as good a price as the others?

(Objected to because irrelevant and the answer would be no test of the utility or value of the invention.)

A. Yes. I could make no difference in price.

C. Q. Can you swear positively that all the two-horse drills received by you from the Rude Bros. prior to the third consignment in 1881 had the oblique discharge and the short bearing for the cylinder, like Exhibit B No. 1. Did you notice the drills carefully enough to be sure of this?

A. Yes, sir; they were like that.

C. Q. How long have you been engaged in the sale of grain drills and other agricultural machinery?

(Objected by plaintiff- as irrelevant.)

A. Twenty years.

260 C. Q. Are you familiar with the construction and operation of the various grain drills manufactured and sold in this section of the country?

(Objected to by pl'ff- as irrelevant and not a proper cross-examination.)

A. Yes, sir.

C. Q. State whether you find any more difficulty in selling grain drills with the straight discharge and the bearing at both ends of the cylinder like Exhibit B No. 2 than those with the oblique discharge and short bearing like B No. 1?

(Objected to by plaintiff- as being irrelevant and as improper cross-examination, not being pertinent to the matters testified to in chief.)

A. They sell equally as well and for the same price.

C. Q. Has either the oblique discharge or the short bearing any advantage whatever in the market over the straight discharge and double bearing?

(Objected to for same reasons as last question.)

A. I can see none.

C. Q. Can you get any more money for the one than from the other?

(Objected to for same reasons as last question by pl'ff-.)

A. No, sir.

261 C. Q. When did you first notice the difference between the constructions shown in these Exhibits B 1 & B 2?

A. When my attention was called to it by the Rude Bros., about the time of the shipment of the sample drill, in 1881, I may say I did — notice the difference between the straight and oblique discharge until pointed out to me to-day.

Re-examination by Henry C. Fox, Esq., for pl'ffs:

Q. Did you ever make any practical test as to the relative merits of seed cups with straight and oblique discharge orifices?

A. I never have.

Q. Can you tell what effect oblique discharge orifices will have in discharging grain different from that of straight discharge orifices?

A. It would have no effect at all.

Q. Will they discharge grain in the same manner?

A. Precisely the same.

Q. Did you ever make any practical test as to which would sell best in market—grain drills with oblique discharge orifices and straight discharge orifices—by representing to purchasers their relative merits?

A. No, sir; because I did not know there was a difference.

262 Q. Did Rude Bros. ever notify you by letter or otherwise, during the three years during which you have been handling their goods, that they had changed the feed cups on their drills; if so, when and how often?

(Objected to by defendants as irrelevant and not proper subject for redirect examination.)

A. Yes, sir; in the year 1881, when they sent that sample drill, about the month of June, and once or twice afterwards. The notice in the month of June was the first one I received.

H. RENSTEDLER.

Here plaintiffs' counsel offers in evidence plaintiffs' exhibits marked Seed Cup B No. 1 and exhibit marked Seed Cup A No. 1; also defendants offer in evidence defendants' exhibits marked Seed Cup A No. 2 and B No. 2.

And it was also agreed between the said counsel representing parties to this action that the plaintiff- and defendant- shall take into and keep in their possession the exhibits above offered in evidence by them, respectively, subject to the order of either at any time and at the trial. Commissioner to take this testimony and the notice by law required is waived by defendants' counsel.

ANDREW M. SULLIVAN,
Special Examiner.

263 In the United States Circuit Court for the District of Indiana.

JOHN M. WESTCOTT *et al.*
vs.
WAYNE AGRICULTURAL COMPANY *et al.*

I, Andrew M. Sullivan, specially appointed by the said court to take and certify the testimony of the witnesses to be examined in the above-entitled cause, do certify that on the 2nd day of December, A. D. 1881, at the business office of Henry Reinstedler, No. 1124 Broadway, in the city of St. Louis, Missouri, complainants produced before me as a witness on their behalf Henry Reinstedler and none other, and the defendants produced no witness; that said witness was first sworn by me to testify the whole truth of his knowledge touching the matters in controversy between the parties to said cause, and that thereupon he was examined in my presence and in presence of counsel representing the parties hereto, to wit, Henry C. Fox, Esq., counsel for complainants, and Arthur Stem, Esq., counsel for defendants; that by my determination said examination was by question and answer; that the testimony of said witness 264 upon said examination was taken down by me in writing in his presence and in the presence of both of said counsel, and afterwards it was read over to said witness by me and was thereupon signed by him; that the objections made by said counsel respectively to testimony were noted by me, and all appear in said deposition; that in the course of said examination divers exhibits were deposited with me by both parties in connection with the testimony of said witness, all of which were marked for identification by me, and thereupon it was agreed between the said counsel representing the parties to this action respectively that the plaintiff- and defendants should take into and keep in their possession the said exhibits offered in evidence by them respectively, subject to the order of either at any time and at the trial; and, further, that the commissioner to take this testimony and the notice required was waived by defendants' counsel; that I have herein noted all objections made by counsel concerning this deposition; which deposition, with notice and order of court appended, is hereby returned into court.

265 In testimony whereof I have hereto set my hand this 5th day of December, A. D. 1881, at the city of St. Louis, Missouri.

ANDREW M. SULLIVAN,
Special Examiner.

In the Circuit Court of the United States for the District of Indiana.
November Term, 1881.

JOHN M. WESTCOTT *et al.*
vs.
WAYNE AGRICULTURAL CO. *et al.*
} Chancery No. 7266.

Before Hon. Walter Q. Gresham, judge.

NOV. 28TH, 1881.

Come now the complainants, by H. C. Fox, Esq., solicitor, and upon his motion it is ordered that Andrew M. Sullivan, of the city of St. Louis, Missouri, be, and he is hereby, appointed special examiner in chancery in this cause, and is empowered to cause to come before him, at the office of Henry Reinstedler, No. 1024 to 1028 Broadway, in said city, upon proper notice given to the defendants, the witnesses of the complainant-, and to take their depositions in writing and return the same, duly certified, into this court, addressed to the clerk thereof at Indianapolis.

UNITED STATES OF AMERICA, *District of Indiana:*

266 I, Noble C. Butler, clerk of the circuit court of the United States within and for said district, do hereby certify that the above and foregoing is a full and true copy of an order this day made and entered in said court.

Witness my hand and the seal of said court, at Indianapolis, in said district, this 28th day of November, 1881.

[SEAL.] NOBLE C. BUTLER, *Clerk.*

267 In the Circuit Court of the United States for the District of Indiana. November Term, 1881.

JOHN M. WESTCOTT *et al.*
vs.
SQUIRE B. RUDE *et* —.
} Chancery No. 4314.

Before Hon. Walter Q. Gresham, judge.

DECEMBER 19TH, 1881.

Come now the complainants, by H. C. Fox, their solicitor, and upon his motion it is ordered that Thomas D. Evans, of the town of

Silsby, Union county, Indiana, be, and he is hereby, appointed special examiner in chancery in this cause, and is empowered to cause to come before him, at his office in said town of Silsby, upon proper notice given to the defendants, the witnesses of the complainants, and to take their depositions in writing and return the same, duly certified, into this court, addressed to the clerk thereof at Indianapolis.

UNITED STATES OF AMERICA, *District of Indiana:*

I, Noble C. Butler, clerk of the circuit court of the United States within and for said district, do hereby certify that the above and foregoing is a full and true copy of an order this day made and entered in said court.

Witness my hand and the seal of said court, at Indianapolis, in said district, this 19th day of December, 1881. 268

NOBLE C. BUTLER, *Clerk.*

Circuit Court of the United States for the District of Indiana.

JOHN M. WESTCOTT *et al.*
vs. } No. 4314.
SQUIRE B. RUDE *et al.*

Before the master.

The defendants will take notice that the complainants will examine witnesses in this cause, under an order herein, at the office of the agent of the C. H. & I. R. R., at Liberty, in the county of Union, in the State of Indiana, on Thursday, the 29th day of December, 1881, beginning said examination at 10 o'clock a. m. of said day, and continuing from day to day until completed.

WOOD & BOYD,
Solicitors for Complainants.

Received copy Dec. 23d, 1881.

STEM & PECK,
Solicitors for Def't-.

In the Circuit Court of the United States for the District of Indiana.
November Term, 1881.

JOHN M. WESTCOTT *et al.*
vs. } Chancery No. 4314.
SQUIRE B. RUDE *et al.*

Before the Hon. Walter Q. Gresham, judge.

269 To John L. Groves, sheriff of Union county, Indiana, and as special officer to serve this subpœna:

You are commanded to summons Henry C. Ham to appear before me, at my office, to be that day in the depot of Cincinnati, Hamilton and Indianapolis Railroad Company, in the town of Liberty, Union county, Indiana, at nine o'clock a. m. of the 29th day of December, 1881, next, then and there to be examined in behalf of the plaintiff- in a certain action pending in the circuit court of the United States for the district of Indiana, wherein John M. Westcott *et al. is* plaintiff- and Squire B. Rude *et al. is* defendant-, and have you then and there this writ.

[SEAL.] THOMAS D. EVANS,
Notary Public for said County and Special Examiner
in Chancery in the Above-Entitled Cause.

Endorsed.

This writ is returned served on the within-named witness, Henry C. Ham, by reading to — and in his hearing this 26th day of December, 1881.

J. L. GROVE,
Sheriff, U. C.

270 In the Circuit Court of the United States for the District of Indiana. November Term, 1881.

JOHN M. WESTCOTT *et al. vs.* SQUIRE B. RUDE *et al.*

Before the Hon. Walter Q. Gresham, judge.

To John L. Groves, sheriff of Union county, and as special officer to serve this subpœna:

You are commanded to summon Henry C. Ham to appear before me instanter and bring with him the books of his office, as agent of the C., H. & D. R. Company, known as the freight forwarding books of said office for the years 1868, 1869, 1870, 1871, 1872, 1873, 1874, 1875, 1876, 1877, 1878, 1879, 1880, & 1881, to produce said books on the examination now in progress before me as special examiner, said examination now being held in the office of the C., H. & I. R. R. Company in said town, in the case of John M. Westcott *et al. vs.* Squire B. Rude *et al.*, now pending in the United States circuit court for the district of Indiana, and herein make you due return of this writ.

Dec. 29, '81.

THOMAS D. EVANS,
Notary Public & Special Examiner of said County
for this Cause.

271 Circuit Court of the United States for the District of Indiana.
In Equity.

JOHN M. WESTCOTT *et al.* *vs.* SQUIRE B. RUDE *et al.*	No. 4314.

Examination of witnesses on behalf of the complainants under the 67th rule in equity, as amended, pursuant to the annexed notice.

Present: Henry C. Fox and John M. Westcott, for the complainant-, and C. M. Peck, of counsel for the respondents.

By request of parties it is ordered that the depositions be taken by question and answer.

HENRY C. HAM, a witness produced on behalf of the complainant-, being first duly sworn, deposeth and saith, in answer to interrogatories propounded to him by HENRY C. FOX, Esq., of counsel for the complainants, as follows:

Question 1. State your name, age, residence, and occupation.

Answer. Henry C. Ham is my name; my age is 37; residence, Liberty, Union county, Indiana; occupation, railroad agent of C., H. & D., C. H. & I. Company.

Question. How long have you been acting as the agent of the railroad company and at what points?

Answer. I have been agent at Liberty, Indiana, since September 10th, 1873.

272 Question. Are you acquainted with the defendants in this action?

Answer. I am acquainted with Squire B. Rude, John R. Rude, and George W. Rude.

Question. State, if you know, what business they have been engaged in since you have been agent, and where their principal place of business is and has been.

Answer. They have been engaged in the manufacture of agricultural implements and planing-mill business, and some years ago built some houses in connection with their planing-mill work. Their principal place of business is and was Liberty, Union county, Indiana.

Question. State under what name they have been doing business, if you know.

Answer. Under the firm name of Rude Brothers.

Question. What kind of farm implements have they been engaged in manufacturing?

Answer. A sulky corn plow, one-horse corn drills, and one and two horse wheat drills or grain drills.

Question. State what name they have called their wheat drills, if you know.

Answer. Part of the time it was called "Indiana" and part of the time the "Improved Indiana."

Question. When did they first commence making wheat drills, to your recollection?

273 Answer. As near as I can recollect in 1874. I am not sure about this and may have missed it a year.

Question. Were you ever in their employ?

Answer. Yes, sir.

Question. When did your employment begin and when did it cease?

Answer. I can't give dates. I think I began some time in 1874 and worked for them, keeping their books here and at the shops, altogether something of two years.

Question. In what capacity did you work for them?

Answer. Book-keeper.

Question. Did you make all their record entries for them?

Answer. While keeping at the depot I did not. I merely posted from their blotters. When I worked at their office I made all the entries myself.

Question. Did you make the entries of shipments of drills made by them during the time you was in their employ?

Answer. I made the entries while I worked down at their office. While I worked here at the depot I did not.

Question. Give the best impression you have of the length of time you made entries of the shipment of drills for them.

Answer. I made all the entries of all the shipments made by them, I think, for something over a year.

274 Question. In what year was that?

Answer. It was in either 1874 or 1875, and I cannot tell which.

Question. State your best impression that you have of the number of wheat drills that was entered by you and shipped by them during that time.

Objected to by counsel for defendants as irrelevant, for the reason that it already appears in evidence that the defendants made several styles of drills, only one of which has been found by the court to infringe the complainants' patent, and it not appearing that the machine inquired about of their witness belong to the infringing style of drills.

Answer. I don't remember particularly. I could not tell; it might have been ten or a hundred; I have no distinct recollection of any.

Question. Has there been any wheat drills delivered to you for shipment since you have been agent of the railroad company by the Rude Bros.?

Answer. Yes, sir.

Question. Have you, as agent of the company, made any entry in the books of your office of such delivery and shipments?

Answer. Yes, sir.

275 Question. In what kind of a book or record have you made such entries, and have you those books now in your possession?

Answer. The record is in what we call our freight-forwarding book, and to the best of my knowledge they are in my possession.

Question. Whereabouts do you keep them?

Answer. In the freight office of the company.

Question. Whereabouts is that office in relation to the place where you are now sitting?

Answer. It is in the next room there north.

Question. How many of those books have you in your possession that contain entries of shipment of wheat drills made — the Rude Bros.?

Answer. There is, I suppose, from seven to ten books. It would take about that many to cover the time.

Question. Have you made entries of all shipments of such drills made by you as agent in those books?

Answer. I have not made all the entries myself; some have been made by clerks, and if the books are all here the entries are all in the books.

Question. Have you the freight-forwarding books belonging to the office for the years 1868, 1869, 1870, 1871, 1872, and 1873?

Answer. I don't know. Part of them are here, I know. Some
time after I came here I had orders to send in all over six
276 years old, and I gathered up a lot and sent in.

Question. I ask you to produce the freight-forwarding book for the year 1874.

Objected to by counsel for the defendants for the reason that the books are not the property of the witness, and that they have not been shown to contain data from which the number of infringing drills could be ascertained; also for the further reason that it would disclose to complainant-, who *is* present, the entire private business of the defendants, who are rival manufacturers, and also because there is no order of court compelling the witness to produce the books inquired about; and counsel for defendants instructs the witness that he may, if he chooses, decline to produce the books, except under an order of court.

Answer. I decline to furnish the books, because I have instructions from the general freight agent to furnish only such books as are mentioned in the subpœna.

Complainants here called for a *subpœna duces tecum* upon witness
to produce the books as set out in the subpœna, which I issued.
277 The service upon the witness was then waived by defendant-.

Defendant- objected to the issuance of subpœna and to the production of the books and any evidence from them until it is shown that the books contain data from which the number of infringing machine — factory in contradistinction to other and non-infringing machines be shown.

Complainant-, John M. Westcott and Squire B. Rude, were both present at the time the subpœna was issued, together with their respective counsel.

Question. Can you state from memory the number of wheat drills that has been delivered to you by the Rude Bros. for shipment since you have been agent, as above stated?

Ans. I cannot.

Question. Can you state the character or kind of the seed cups on the drills that have been delivered to you for shipment as aforesaid?

Objected to by defendants as vague in the employment of the term, kind, or character in contradistinction to construction, as this controversy relates wholly to details of construction of the seed mechanism and not generally to its kind or character, when by those terms is understood either force feed or gravity feed or some other generic distinction.

278 Answer. I don't think I can. There has been different kinds, is all I know.

Question. Can you by examining the entries in the freight-forwarding books tell the kind of seed cups used on the drills shipped at the different times when the entries were made?

Answer. No, sir; I cannot.

Whereupon counsel for defendants report this objection to the production of the books or any testimony from them as furnishing no evidence relevant to this controversy.

Question. I now ask you to produce the freight-forwarding books for 1880.

Answer. The books here shown are from July 1st, 1880, to the present time.

Question. Turn to those books and find the first shipment of drills by the Rude Bros. as shown in this book.

Answer. On July 2nd, 1880, they shipped two drills separate and a lot in a car, and don't say how many, billed as agricultural implements, more or less.

Question. To whom were they shipped, and where?

Objected to by counsel for defendants, as it does not appear that these particular drills were infringing drills and as going into the defendants' private business without any right.

579 Answer. One was to D. H. Lubker, Brownstown, Indiana; one to A. W. McKinney, Red Key, Indiana. The lot, more or less, went to Mansfield, Ohio.

Question. Where is the next entry?

Same objection by defendants' counsel.

Answer. The next shipment is July 6th, 1880.

Question. How many drills and to whom was this shipment?

Answer. To M. Stevens & Son, Shelbyville, Indiana, 1 drill; to E. Cord & Co., Terre Haute, Indiana, 12–8 hoed drills and 3–5 hoed drills; to Charles Samoniel, Brookville, Indiana, 1–8 hoed drill; to Griffith and Sauter, Ghent, Kentucky, 1–8 hoed drill and 1–5 hoed drill; to Thompson & Fisher, Greensburg, Indiana, 1–8 hoed drill.

Question. Where is the next entry and what does it show?

Answer. July 7, 1880, to Lake & Cobal, Pemberville, Ohio, 11 eight-hoed drills; to D. H. Lubker, Brownstown, Ohio, 1–8 hoe drill.

Question. Where is next entry and what does it show?

Counsel for defendants repeat their former objection and, for additional reason, state that the machines now inquired about were
sold after the expiration of one of the patents here in
280 controversy, and their connection with the unexpired patent
has not been shown.

It is now agreed that at the close of this examination the defendants' counsel may present any and all objections they desire to the questions and answers herein given.

Witness says: On July 8, 1880, we shipped to Philips & Bro., Lebanon, Ind., 3–8 hoe drills; to Harry Johnson, Metropolis, Illinois, 1–8 hoe drill; to Levi Bros., Paducah, Ky., 1–8 hoe drill; July 9th, to E. E. Carmine, Shelbyville, Ind., 6–5 hoe drills; July 10th, to Stoopman & Pittsbaugh, Peru, Ind., 4–8 hoe drills; to Lumden & Devoe, Monticello, Ill., 1–8 hoe drill; to Haywood Bros., Bloomington, Ill., 1–8 and 1–5 hoe drill; H. C. Porter, Farmer City, Ill., 1–8 and 1–5 hoe drill; to Henry Shultz, Edemire, Mo., 1–5 hoe drill; to A. D. Brooks, Kendalville, Ind., 2–8 hoe drills; on July 14, '80, to J. F. McCracken, Huntsville, Ala., 1–8 hoe drill; on July 16, '80, Tinsley & Martin, Crawfordsville, Ind., 1–5 hoe drill; on July 17, '80, to D. C. Hume, Griggsville, Ill., 1–5 hoe drill; on July 19, '80, J. W. Fenton, Oxford, Ohio, 1–8 hoe drill; on July 20, '80, one lot agri-
cultural implements to H. P. Wetsell, agent, Indianapolis, for
281 H. Reinstedler, Saint Louis, Mo.; to Miller & Guthrie, Martins-
ville, 1–8 hoe drill; to J. T. West, Bowling Green, Ky., 1–5 hoe
drill; to A. Bruner, Defiance, Ohio, 1–8 and 1–5 hoe drill; to Gordon & Bros., Antwerp, Ohio, 1–8 hoe drill; to H. Klinger, Bradford, Ohio, 1–8 hoe drill; on 21st July, '80, to John Lands, Carmine, Ills., 6–8 hoe drills; on July 21st, Johnson & Hollowell, Leesburg, Ohio, 1–8 hoe drill; to David Cotwell, Uniontown, Ky., 1–8 hoe drill; to S. T. Royalty, Golcenda, Ill., 1–8 hoe drill; to D. Shordan, Fort Wayne, Ind., 1–8 hoe drill; on July 22, '80, O. C. Griffith & Co., Connersville, Ind., 1–5 hoe drill; on 22d July, 1880, O. H. Giddings, Danville, Ill., 3–8 hoe drills; to C. E. Merrifield, Indianapolis, Ind., 2–8 & 3–5 hoed drills; to D. H. Parks, Decatur, Ill., 5–5 hoe drills; to J. N. Meiers & Co., Auburn, Ind., 5–8 hoe drills; to Adam Cully, Geneva, Ind., 6–8 hoe drills; Seeley & Loyd & Co., Pillsfield, Ill., 5–5 hoe drills; on July 23d, '80, Halfield & Palmer, care of J. C. Buckles & Co., Cincinnati, 1–8 hoe drill; on July 24, '80, to Ballenger & Smith, Vincennes, Ind., 1–8 hoe drill; to A. S. Copps, Illiopolis, Ill., 1–8 hoe drill; to Mitchell & Bros., Carmi, Ill., 5–8
hoe drills; to W. H. Coffin, Oakland, Ill., 5–8 hoe drills; on
282 July 26, '80, to B. Hinkley, Charleston, Ills., 1–5 hoe drill;
on July 27, one car-load agricultural implements to I. B. &
W. R. R. for C. H. Giddings & Co., Danville, Ill.; on July 28, '80, to B. Judy, London, Ohio, 1–5 hoe drill; July 29, '80, John Lands, Carmi, Ill., 6–8 hoe drills; C. E. Merrifield, Indianapolis, Ind., 2–3 hoe drills; to Wilson & Thompson, Muncie, Ind., 4–3 hoe drills; to J. N. Myers & Co., Auburn, Ind., 6–8 hoe drills; Lesh & Buckley, Bluffton, Ind., 5–8 hoe drills; to Porsinger, Adams & Co., Marva,

Ill., 1–8 hoe drill; to Hubeth, Levy & Co., Huntington, Ind., 1–8
hoe drill; Mayall & Kelly, Maysville, Ky., 3–5 hoe drills; on July
30, '80, to George Foltz, Lipsic, Ohio, 1–8 hoe drill; on July 31, '80,
to E. H. McKallip, Equality, Ill., 6–8 hoe drills; to William Kinderman,
Booneville, Ind., 1–8 hoe; J. W. MacJohnson, Owensboro',
Ky., 1–8 hoe; on August 3, '80, Mayer & Wheeler, Flora, Ind., 4–8
hoe drills; Eli Smith, Albany, Ind., 1–8 hoe drill; G. H. Mussemman,
Sunman, Ind., 1–8 hoe drill; Miller & Daily, Powers' Station,
Ind., 1–8 & 2–5 hoe drills; on August 4, '80, to Post
& Benton, Taylorsville, Ind., 12–5 hoe drills; on August 4,
to J. C. Liggett, Ripley, O., 3–5 hoe drills; on August 5, to
James Maltens, Osceola, Ill., 3–8 & 1–5 & 1–3 hoe drills; on
Aug. 5, '80, P. D. Demene, Roseville, Ill., 1–8 & 1–5 hoe
283 drill; to T. S. Gordon, Winchester, Ind., 1–8 and 1–5 and 1–3
hoed drills; Aug. 6, by D. B. W. R. R., to Mitchell Bros.,
Cresman, Ill., 1–8 hoe drill; Aug. 7, '80, to Strickland & Hill, Sullivan,
Ill., 2–5 hoe drills; to Ely Bros., Mason City, Ill., 1–5 hoe drill;
— Robert Morris, New Lisbon, Ind., 1–5 hoe drill; Aug. 9th, 1 car
of agricultural implements, H. P. Wetsell, agent, Indianapolis, Ind.,
for H. Rheinstedler, St. Louis, Mo.; Stultzman & Pettebaugh, Peru,
Ind., 1–5 hoe drill; to James Malters, Arcola, Ill., 2–8 hoe drills;
to John Taylor, 1–5 hoe drill; Aug. 10, Mayers & Wheeler, Flora,
Ind., 6–5 hoe drills; Tinsley, Martin & Co., Crawfordsville, Ind., 2–3
hoe drills; W. H. Coffin, Oakland, Ill., 3–8 hoe drills; to J. V. Myers
& Co., Auburn, Ind., 4–8 hoe drills; Aug. 11, Hayward Bros. & Co.,
Bloomington, Ill., 3–5 hoe drills; Ebal Teeters, Goldsmith, Ind., 1–5
hoe drill; Aug. 11, '80, Mansfield & Jones, Rockport, Ind., 1–8 hoe
drill; J. W. Fenton, Oxford, 1–5 hoe drill; Aug. 12, '80, Mitchell
Bros., Cresman., Ill., 1–8 hoe drill; P. Hinkley, Charleston, Ill., 11–8
hoe and 5–5 hoe drills; O. P. Griffith & Co., Connersville, Ind., 1–5
hoe; on August 13, Sorrell & Vanader, Tolono, Ill., 3–5 hoe; A. S.
Capps, Illiopolis, Ill., 2–5 hoe; H. Ramsey, Louisville, Ky., 1–8
hoe and 1–5 hoe; August 14, Tinsley, Martin & Co., Crawfordsville,
284 Indiana, 1–5 hoe; John Shelly, Lebanon, Ind., 1–5
hoe; George B. Gibson, Rising Sun, Ind., 2–8 hoe; Cole &
Gibson, Deshler, Ohio, 2–8 hoe; Aug. 16, A. A. Clarke & Co., Colfax,
Ind., 2–5 hoe; Lillard & Phillips, Zenia, Ind., 1–3 hoe; Haywood
Bros. & Co., Bloomington, Ill., 3–5 hoe; O. P. Griffen & Co., Connersville,
Ind., 1–5 hoe; Walter Painter, Bellefontaine, Ohio, 1–5
hoe; August 17, H. P. Wetsel, Indianapolis, for Harmon & Bros.,
Evansville, Ind., agricultural implements; August 17, J. G. Bryson,
Brazil, Ind., 2–8 hoe; Aug. 17, Thomas S. Gordon, Winchester, Ind.,
1–5 hoe; Aug. 18, '80, Tinsley & Martin, Crawfordsville, Ind., 4–3
and 2–5 hoe drills; Wm. Carver, Alexandria, Ind., 1–8 and 1–5 hoe
drill; Perry & Jamison, Rushville, Ind., 3–8 hoe drill; Lucus &
Stevens, Columbus, Ind., 2–5 hoe drills; O. P. Guffis & Co., Connersville,
Ind., 1–5 hoe drill; August 18, '80, J. T. Littlejohn, Madison,
Ind., 1–8 hoe drill: 19th August, '80, Charles Laremore, Knox, Ind.,
1–8 hoe drill; J. W. Fenton, Oxford, Ohio, 2–8 hoe drills; August 20,
'80, M. Nixon, Veedersburg, Ind., 3–4 hoe; Tinsley & Martin, Crawfordsville,
Ind., 1–5 hoe drill; Hayward Bros. & Co., Bloomington, Ill.,

2–5 hoe drills; C. C. Merrifield, Indianapolis, Ind., 5–5 hoe drills;
285 August 21, Perry & Jameson, Rushville, Ind., 3–8 hoe drills;
C. E. Merrifield, Indianapolis, Ind., 5–3 hoe drills; M. Nixon,
Veedersburg, Ind., 8–3 hoe drills; A. S. Capps, Illiopolis, Ill., 2–5
hoe drills; J. H. Thurston, Alexandria, Ind., 1–5 hoe drill; August
23, James Malters, Arcola, Ill., 1–8 hoe drill; Lucus & Stevens,
Columbus, Ohio, 3–5 hoe drills; S. E. Roberts, Richmond, Ind., 1–5
hoe drills; Alexander Site, Ridgeville, Ind., 2–5 hoe drills; August
24, H. & Wm. Bell & Co., Knightstown, Ind., 3–3 hoe drills; P. B.
Demaree, Rossville, Ill., 7–8 hoe drills & 1–5 hoe; W. A. Coffin,
Oakland, Ill., 2–8 hoe drills; August 25, H. P. Wetsel, agent, Indianapolis,
Ind., for H. Rheinstedler, St. Louis, 1 car agricultural implements,
more or less; J. G. Bryson, Brazil, Ind., 1–8 hoe; Strickland
& Hill, Sullivan, Ill., 6–5 hoe drills; R. A. Clarke, Colfax, Ind., 4–5
hoe drills; R. S. McColley, Tontognee, 1–8 hoe drill; Charles Wamerschumacker,
Otterville, Ohio, 1–9 hoe drill; August 26, P. B.
Demeree, Rossville, Ill., 2–8 hoe and 1–5 hoe drill; McKinney &
Moore, Bunker Hill, 1–8 hoe; Madlin & Ice, Newcastle, Ind., 2–5
hoe; Thomas B. Hunt, Ashland, Ind., 1–5 hoe; Lucas &
286 Stevens, Columbus, Ind., 3–5 hoe; Schlich & Pearson, Coldwater,
Ohio, 2–8 hoe; Thomas S. Gordon, Winchester, Ind.,
1–8 hoe & 2–5 hoe; Jacobs Bros., Columbus, Ohio, 1–8 hoe, 1–5 hoe,
and 1–3 hoe; August 27, Ely Brothers, Mason City, Ills., 2–5 hoe;
A. S. Capps, Illiopolis, Ill., 2–5 hoe; Wilson & Thompson, Muncie,
Ind., 3–3 hoe; J. W. Fenton, Oxford, Ohio, 1–8 hoe; August 28,
'80, Perry & Jamison, Rushville, Ind., 3–8 hoe; August 30, E. B.
Demaree, Rossville, Ill, 2–8 hoe; C. H. Giddings & Co., Danville,
Ill., 4–5 hoe; Tinsley, Martin & Co., Crawfordsville, Ind., 1–5 hoe
and 2–7 hoe; F. Clenenger, Union City, Ind., 1–8 hoe; A. W. McKinney,
Red Key, Ind., 1–5 hoe; August 31st, 1880, Lucus &
Stevens, Columbus, Ind., 5–5 hoe drills; Cole & Gibson, Holgate,
Ohio, 1–9 hoe; Miller & Dailey, Powers Station, Ind., 2–5 hoe
drills; J. W. Fenton, Oxford, Ohio, 1–8 hoe; September 1st, H.
P. Wetsel, agent, Indianapolis, Ind., for H. Rheinstedler, St. Louis,
1 car-load of agricultural implements; R. Bryson, Worthington,
Ind., 5–8 hoe drills; Tinsley, Martin & Co., Crawfordsville, Ind.,
3–8 hoe drills; A. J. & E. T. Ice, Newcastle, Ind., 2–5 hoe; Norris
Bros., Rushville, 1–5 hoe drill; September 2, James Matters,
287 Arcola, Ill., 1–8 hoe; Perry & Jamison, Rushville, Ind., 2–8
hoe; T. S. Gordon, Winchester, Ind., 3–5 hoe; September 3rd,
1881, J. S. Kellogg, Wabash, Ind., 1–8 hoe and 1–3 hoe; C. E. Merrifield,
Indianapolis, 6–3 hoe drills; Charles E. Karmire, Shelbyville,
Ind., 5–5 hoe drills; Post & Barton, Taylorsville, Ill., 1–5 hoe; J. C.
Hoover, Hamilton, Ohio, 1–5 hoe; Samuel Kline, College Corner,
1–8 hoe; J. W. Fenton, Oxford, Ohio, 4–5 hoe; September 4th, Francis
& Davis, Panora, Iowa, 1–5 hoe drill; James Malters, Arcola, Ill.,
1–5 hoe; Wilson & Thompson, Muncie, Ind., 2–5 hoe and 1–3 hoe;
O. P. Griffith & Co., Connersville, Ind., 1–8 hoe; September 6, F. D.
Vorhis, Neoga, Ills., 1–5 hoe & 1–3 hoe; James Akers, College
Corner, Ohio, 1–5 hoe; September 7, Persinger, Adams & Co., Marva,
2–5 hoe; T. B. Demaree, Rossville, Ill., 1–8 hoe & 1–5 hoe; Wil-

son & Thompson, Muncie, Ind., 3–5 hoe & 2–3 hoe; R. Morris,
New Lisbon, Ind., 3–5 hoe; September 7, J. W. Fenton, Oxford, Ohio,
1–8 hoe; Lucus & Stevens, Columbus, Ohio, 5–5 hoe; September 8,
N. Nixon, Veetersburg, Ind., 2–5 hoe; A. S. Capps, Illiopolis, Ill., 3–5
hoe; Lumsden & Deor, Monticello, Ill., 1–5 hoe; Charles Laramore,
288 Knox, Ind, 1–8 hoe; S. Ward, Monticello, Ind., 1–8
hoe; H. P. Wetsell, agent, Indianapolis, 1 car-load agricultural
implements; September 9th, Archie & Twillie, Marshall, Ills.,
4–8 hoe and 4–5 hoe; Cook & Conger, Eaton, Ohio, 1–5 hoe; September
10th, I. S. Winger, Toledo, Ohio, 1–8 hoe; September 11th,
Post & Barton, Taylorsville, Ill., 4–5 hoe drill; R. Bryson, Worthington,
4–8 hoe; J. S. Kellogg, Marion, Ind., 1–8 hoe; September 13,
Tinsley & Martin, Crawfordsville, Ind., 2–3 hoe; A. S. Capps, Illiopolis,
Ill., 3–5 hoe; Ely Bros., Mason City, Ill., 1–5 hoe; C. P. Griffith,
Connersville, Ind., 1–5 hoe; Perry & Jamison, Rushville, Ind., 1–8
hoe; George W. Vanarsdell, Adams, Ind., 1–8 hoe and 1–5 hoe;
Rude Bros., Dayton, Ohio, 1–8 hoe; September 14, R. Bryson, Worthington,
Ohio, 1–9 hoe; J. W. White, Zanesville, Ind., 1–9 hoe; September
15, J. H. Kelley, Winnemac, 1–9 hoe; O. P. Griffith, Connersville,
1–8 hoe and 1–5 hoe; Lucus & Stevens, Columbus, Ind.,
3–5 hoe; J. W. Fenton, Oxford, Ohio, 1–8 hoe; September 16,
Wm. S. Gray, Dillsborough, Indiana, 1–8 hoe; Cole & Gibson,
Holgate, Ohio, 1–8 hoe; J. W. Fenton, Oxford, Ohio, 1–8 hoe;
September 17, H. C. Wetsell, agent, Vandalia, for H. Rhinstedler,
St. Louis, Mo., one car-load of implements; Jno. W.
289 Neughberth, Nelson, Ind., 1–8 hoe; R. S. McColley, Fontogone,
Ohio, 1–8 hoe; September 18, J. D. Bryson, Brazil, Ind., 2–8
hoe; Loyd & Biddinger, Harrison, Ohio, 1–8 hoe; Phillips Bros.,
Lebanon, K., 2–8 hoe; September 20, Fayward Bros. & Co.. Bloomington,
Ill. 1–5 hoe drill; O. P. Griffin & Co., Connersville, 1–8 hoe;
Henry Bell, Philadelphia, Penn., 1–5 hoe; D. H. Lubker, Brownstown,
Ind., 1–8 hoe; September 21, E. Cord & Co., Terre Haute, Ind.,
1–8 hoe; F. D. Vorhis, Neoga, Ill., 1–5 hoe; September 22, J. S.
Kellogg, Springfield, Ill., 1–8 hoe; September 23, H. Rheinstedler,
St. Louis, Mo., car agricultural implements, more or less; September
22, C. E. Merrifield, Indianapolis, 1–8 hoe; October 1, H. Rhinestedler,
St. Louis, Mo., 1–8 hoe; October 14, Henry Bell, Philadelphia,
Penn., 3–5 hoe; November 24, J. W. Fenton, Oxford, Ohio, 2–5 hoe;
January 25, 1881, D. G. Taylor & Son, Sandusky, Ohio, 1–9 hoe
drill; March 5, '81, H. H. Orendorf, Canton, Ill., 1–9 hoe; March
7, Lake & Gable, Pemberville, Ohio, 2–8 hoe; H. Ramsey, Louisville,
Ky., 1–8 hoe; March 8, Dueff McKane & Co., Pittsburgh, Pa.,
290 1–8 hoe; March 11, Bruner & Wheeler, Defiance, Ohio, 2–8
hoe; March 22, '81, H. Rhinestedler, St. Louis, Mo., 1 car-load
agricultural implements; March 31st, J. M. Carter, Grand
Rapids, Ohio, 1–9 hoe drill; April 2, Hubbard and Fay, Bainbridge,
Ind., 1–8 hoe; April 4, Trumbull, Reynolds & Allen, Kansas City,
Mo., car-load of agricultural implements; April 7, J. S. Deemer &
Sons, Wiltshire, Ohio, 1–8 hoe; Erb & Marshall, New Bremen,
Ohio, 1–8 hoe; April 7 or 8, April 13, one car-load of drills to H.
Rhinestedler, East St. Louis, Ill. I don't know what kind of drills

they are. April 15, to R. P. Gregor, Grand Rapids, Ohio, 1–9 hoe; April 20, Sohn & Reutschler, Hamilton, Ohio, 1–8 hoe; April 23, Roberts & Nicksell, 1–8 hoe (Monticello, Ind.); S. F. Andrews, Hebron, Ind., 1–8 hoe; April 23, D. B. Husted, Osborne, Ohio, 1–8 hoe; April 27, Cox & Randells, Maud Station, Ohio, 1–5 & 1–3 hoe drill; May 3, to C. H. Giddings & Co., Danville, Ill., one car-load of drills. I don't know the kind. May 5, George Benedick, Portland, Ind., 2–8 hoe drills; May 7, to Kingman & Co., Peoria, Ill., 1 car of drills. I don't know the kind. May 12, Trumbull, Reynolds & Allen, Kansas City, Mo., 1 car of drills. I don't know the kind.

291 May 14, R. A. Clarke, Colfax, Ind., 5–8 hoe drills; H. D. Carlan, Noblesville, Ind., 1–8 hoe; C. Hinckley, Charleston, Ill., 1–8 hoe & 1–5 hoe; Wm. Feighner, Marion, Ind., 2–8 hoe; May 14, Miller & Albrand, Seymour, Ind., 1–8 hoe; May 17, Beck & Toan, Plymouth, Ind., 1–9 hoe; J. O. Bruner, Wanatoh, Ind., 2–8 hoe; Freeze & Jordan, Bremen, Ind., 1–9 hoe, which is lost; McWilson & Sons, Valparaiso, Ind., 1–8 hoe; John J. McGavock, Nashville, Tenn., 10–8 hoe; May 18, Beatty & Merrill, Patricksburg, Ind., 4–8 hoe; Maudlin & Ice, New Castle, Ind., 1–8 hoe and 2–5 hoe; F. P. Burge, Salina, Ohio, 1–8 hoe; May 19, Walther Bros., 1–3 hoe; May 21, Myer & Wheeler, Cutler, Ind., 1–5 hoe drill; Myer & Wheeler, Flora, Ind., 1–5 hoe; Dunnington & Co., Cloverdale, Ind., 1–8 hoe; May 25th, Myers & Brooks, Auburn, Ind., 10–8 hoe drills; J. K. Pleasants, Vevay, Ind., 5–8 hoe drills; May 26, Johnson, Edgerton, Ohio, 1–8 hoe; B. F. Wortkorter, Glendorf, Ohio, 1–8 hoe; May 26, Rupe & Johnson, Fort Recovery, Ohio, 1–8 hoe drill; B. W. Williams, Veeredem, Ohio, 3–8 hoe drills; Auwer & Netler, Delphos, Ind., 1–8 hoe; May 27, L. D. Hughes, La Grange, Ind., 1–9 hoe; Henry Hothroup, Metropolis, Ill., 1–5 hoe drill; Wm. Lewis, Bridgeport, Ill., 1–5 hoe drill; May 31, A. W. McKinney, Red Key, Indiana, 1–8 hoe drill.

292 Adjourned; and, by agreement of parties, this examination is continued from day to day, under my order, until the witness finishes the examination of all the books described in the subpœna, when the parties are to appear before me again, on the 10th day of January, 1882, and finish this examination. All this done this December 29th, 1881. It is further agreed that the witness, H. C. Ham, may write out from this time his own statement, as under oath, and sign it, and it shall become a part of this examination without objection.

On this the 10th day of January this examination is continued until the 13th of January.

Date.	To whom shipped.	To what point.	No. of 8 hoe.	No. of 5 hoe.
1880.				
June 23	Ezra M. Jenning	Lexington, Ind.	1 car.	
" 24	H. Rhinestedler	E. St. Louis, Ill.	*	
" 26	James Malters	Arcola, Ill.	1	
" "	Avery & Weels	Marysville, Mo.	------	10
" "	J. J. McGavock	Nashville, Tenn.	10	
" 28	Geo. E. Daniels	Iuka, Ill.	5	3
" 29	R. Maxwell	Albany, Ind.	1	
" "	John Davis & Co.	Sullivan, Ind.	11	
July 2	D. H. Lubker	Brownstown, Ind.	2	
" "	A. W. McKinney	Red Key, "	1	
" "	John Marshall	Mansfield, Ohio	†	

*Grain drill. †Car ag'l imp.

H. C. HAM.

293 I further state and swear that the above and foregoing contains all the shipments that are included in all the books in my possession.

H. C. HAM.

Date.	To whom shipped.	To what point.	No. of 8 hoe D.	No. of 5 hoe.
1880.				
June 3	H. Rhinestedler	E. St. Louis, Ill.	*	
" "	Waddell & Depoy		1	
" "	F. Shaffer & Bro.	Decatur, Ind.	6	
" 4	L. Hasfield	Woods, O.	1	
" "	Fulton, Crane & Bro.	Wilmington	1	
" 7	J. C. Pierce	Ridge Farm, Ill.	10	
" "	Fleece & Co.	Danville, Ky.	1	
" "	J. K. Pleasant	Vevay, Ind.	1	1
" "	Overbacker & Colwell	Leavenworth, Ind.	1	
" "	Cole & Gibson	Holgate, "	------	2
" 8	V. H. Parks	Decatur, Ill.	------	5
" "	De Long & Co.	Lexington, Ky.	10	
" 10	J. C. Bryson	Terre Haute, Ind.	*	
" "	John W. Nughbunt	Milan, Ind.	1	
" "	Adam Cully	Geneva, "	1	
" 11	R. A. Clark	Colfax, "	10	
" 12	M. L. Bolen	Tipton, "	----	Three. 1
" "	B. F. Alford	Anderson, Ind.	---	Three. 1
" "	Mooney, Taylor & Smith	Indianapolis, Ind.	1	
" 14	Beardsley & Sears	Lafayette, "	10	
" "	Wm. Snyder	Fowler, "	1	
" 15	Lewis & Stevens	Columbus, "	2	
" 16	John M. Littlejohn	Madison, "	1	
" 19	Beckley & Brock	Mackinaw, Ill.	*	
" "	John Marshall	Mansfield, O.	5	
" 21	A. K. Lane & Son	Shawneetown, Ill.	1	
" "	Burtis & Breckman	Mt. Vernon, Ind.	1	

*Car ag'l imp.

Date.	To whom shipped	To what point	No. of 8 hoe.	No. of 5 hoe.
1880.				
June 22	294 Jacob Fries	Bremerman, “	1	
May 15	John Weir	Ligoner, “	1	
“ 17	Wm. Tibbett	Rochester, “	1	
“ 18	McKinney & Moore	Bunker Hill, “	1	
“ “	Tyler, Harming & Co.	North Manchester, Ind.	1	
“ “	W. H. Coffin	Oakland, “	1	
“ “	C. E. Nofsinger	Denver, “	1	
“ “	P. Hinckley	Charleston, Ill.	1	
“ “	T. D. Voris	Neogo, “	------	1
“ “	F. P. Dowell	Hartford City, Ind.	1	
“ 24	H. Rhinestedler	E. St. Louis, Ill.	*	
“ 26	H. A. Rhodehamel	Sidney, O.	1	
“ “	P. Ewing	Columbus Grove, O.	------	1
“ 27	C. J. Tobin	Champaign, Ill.	------	1
“ “	C. H. Geddings	Danville, “	4	2
“ “	J. H. Wagner	Elwood, Ind.	1	
“ “	T. J. Cuppy	South Whitley, Ind.	1	
“ “	Sewell & Vanarsler	Tolono, Ill.	6	2
“ “	J. C. Brown	Lebanon, Ind.	1	
“ “	Miller & Keller	Forest, Ill.	1	
“ “	Patterson & Tomlinson	Logansport, Ind.	1	
“ “	R. S. Stewart	Fostoria, O.	1	
“ 29	J. M. Lockwood	Sturgis, Mich.	3	
“ 31	John H. Kelley	Winamac, Ind.	4	
“ “	S. B. Shaw	Mt. Carmel, Ill.	4	
“ “	Painter & Franklin	Albion, Ill.	1	
“ “	E. B. Pierson	Cold Water, O.	1	
June 1	B. Judy	London, O.	1	
“ “	Gouple & Decker	Bakersville, Ind.	1	
April 13	A. J. & T. E. Ice	Mt. Summit, “	1	1
“ 14	A. Turner	Franklin, “	------	1
1880.				
Apr. 14	295 T. S. Merrill & Co.	Toledo, O.	7	
“ “	Wm. Galbreath	Tiffin, “	2	
“ “	B. M. Gregory	Zionsville, Ind.	1	
“ 16	J. H. Patterson.	St. Mary's, O.	1	
“ “	Johnson & Burke	Edgerton, “	3	
“ 19	Cole & Gibson	Holegate, “	4	1
“ 20	R. Merrill	Spencer, Ind.	2	
“ “	W. D. Carlin	Noblesville, Ind.	------	1
“ 23	King, Kendall & Co.	Endfield, Ill.	1	
“ 24	R. Bryson	Worthington, Ind.	2	
“ “	Lewis & Stephens	Columbus, “	7	
“ 26	Hazenbaugh Bros.	Clinton, “	1	
“ “	Mitchell Bros.	Chrisman, Ill.	2	
“ “	J. R. Mills	Covington, Ind.	1	
“ 28	Asche & Trolley	Marshall, Ill.	*	
“ 29	R. M. Miller	Bellefontaine, O.	1	
May 7	Miller & Guthridge	Martinsville, Ind.	1	
“ “	D. H. Goble	Greenfield, “	1	
“ “	Hubbard & Fry	Bainbridge, “	1	
“ “	G. W. Hazelrigg	Thorntown, “	1	
“ “	Allen & Mervin	Cloverdale, “	1	
“ “	O. P. Griffith	Connersville, “	1	1
“ “	Wyeswager & Shafer	Troy, O.		
“ 10	Isaac N. Whitehead	Laporte, Ind.	1	
“ 13	R. Swether	New Madison, O.	1	
“ 14	Peter Staley	Nappanee, Ind.	1	

* Car ag'l imp.

Date.	To whom shipped.	To what point.	No. of 8 hoe.	No. of 5 hoe.
1879.				
Sept. 25	J. J. McGavock	Nashville, Tenn.	1	
" 26	"	" "	1	
" 29	Frank Allen	Vevay, Ind.	------	1
Oct. 20	J. J. McGavock	Nashville, Tenn.	------	2
1880.				
Feb'y 2	Deer, Mansure & Co.	Kansas City, Mo.	------	1
1880.				
Feb. 16	296 H. Rhinestedler	E. St. Louis, Ill.	1	
" "	M. H. & J. W. Wagner	Prospect Park, "	1	
" 19	Ainsworth & Bonebright	Des Moines, Iowa	1	1
" 24	Johnson & Burke	Edgerton, O.	1	
" 28	Lucas & Stevens	Columbus, Ind.	1	
M'ch 2	J. C. Buckles & Co.	Cincinnati, O.	1	
" 6	John Marshall	Mansfield, "	1	
" 16	Buckley & Brock	Mackinaw, Ill.	1	1
" 22	F. Scholl & Co.	Toledo, O.	1	
" 24	Dayton Malleable Iron Co.	Dayton, "	------	1
" 25	Arch & Son	Marshall, Ill.	1	
" "	Ray, Rice & Stewart	Camden, Ind.	1	
" "	L. S. Gilbert	Harper, Iowa	9 hoe. 1	1
" "	H. & J. H. Adams	Fentonville, N. Y.	1	
" 27	T. S. Merrill	Toledo, O.	1	1
" "	R. L. McCoffey & Son	Tontogony, O.	1	
" 29	J. B. Mahan	Dunkirk, "	1	
" "	J. C. Buckle & Co.	Cincinnati, "	------	1
April 5	H. Rhinestedler	E. St. Louis, Ill.	*	
" 10	H. Rhinestedler	" "	*	
" 13	Blackledge & Falkon	Anderson, Ind.	3	
" "	Ruben Thompson	Muncie, "	6	6
" "	Lish & Buckley	Bluffton, "	1	
1879.				
Sept. 4	Beardsley & Sears	Lafayette, Ind.	2	
" "	R. A Clark	Colfax, "	2	
" "	Westcott & Co.	Xenia "	1	
" 5	J. G. Bryson	Brazil, "	4	
" 6	H. Rhinestedler	E. St. Louis, Ill.	12	
" "	W. J. Snider	Middletown, O.	2	
" 8	Beardsley & Sears	Lafayette, Ind.	4	
" "	W. J. Snider	Middletown, O.	2	
1879.				
Sept. 8	297 Beardsley & Sears	Lafayette, Ind	4	
" "	W. J. Snider	Middletown, O	2	
" "	G. De Camp	Oxford, "	1	
" 9	Stuttsman & Pullenbaugh	Peru, Ind	9 hoe. 2	
" "	John G. Bryson	Brazil, Ind	6	
" "	R. A. Clarke & Co	Colfax, "	2	
" "	D. H. Lubker	Brownstown, Ind	2	
" 11	N. W. Jones	Greggsville, Ill	------	2
" 12	H. Rhinestedler	E. St. Louis, "	6	
" "	R. Bryson	Clay Co., Ind	2	
" 15	C. E. Karmire	Shelbyville, Ind	------	2
" "	H. Rhinestedler	E. St. Louis, Ill	4	
" "	S. H. Rodehamel	Sidney, O	2	
" 16	S. B. Shaw	Mt. Carmel, Ill	2	
" "	C. E. Karmire	Shelbyville, Ind	------	3
" 17	R. Bryson	Terre Haute, "	2	

*Car ag'l imp.

Date.	To whom shipped.	To what point.	No. of 8 hoe.	No. of 5 hoe.
1879.				
Sept. 18	C. E. Karmire	Shelbyville, “	----	2
“ “	W. H. Hill	Cincinnati, O	------	4
“ 20	“	“ “	------	1
“ “	J. J. McGavock	Nashville, Tenn	2	
“ 23	“	“ “	1	
Aug. 27	J. F. Drish	Mattoon, Ill	4	
“ “	Post & Barton	Taylorsville, Ill	------	5
“ “	M. Little	Craig, Mo	------	1
“ “	J. G. Perry	Goodland, Ind	9 hoe. 1	
“ “	R. A. Clark & Co	Colfax, “	------	3
“ “	F. Shafer & Bros	Decatur, “	2	
“ “	W. H. Hill	Cincinnati, O	2	
“ “	Hoover & Son	Hamilton, “	2	
“ 28	Seeley, Loyd & Co	Pittsfield, Ill	------	2
“ 29	H. A. Rhodehamer	Sidney, O	1	
1879.				
Sept. 30	298 S. B. Shaw	Mt. Carmel, Ill	4	
“ “	Beardsley & Sears	Lafayette, Ind	2	
“ “	Stutzman & Pullenbaugh	Peru, “	2	
“ “	R. A. Clarke & Co	Colfax, “	2	
“ “	Cable & Hagemere	Steubenville, O	9 hoe. 1	
“ “	P. B. Dutton	New Bloomington	------	1
“ “	Jacobs Bros	Columbus, O	------	2
“ “	W. H. Hill	Cincinnati, “	2	
“ 1	J. G. Bryson	Brazil, Ind	3	
“ “	Beardsley & Sears	Lafayette, Ind	------	3
“ “	Frank R. Dowell	Hartford City, Ind	3	
“ 2	P. Hinkley	Charleston, Ill	2	
“ “	J. J. McGavock	Nashville, Tenn	2	
“ “	H. A. Rhodehimer	Sidney, O	1	
“ 4	Seely, Loyd & Co	Pittsfield, Ill	------	2
“ “	Martin & Tinsley	Crawfordsville, Ind	------	2
“ “	John D. Scott	Farmer City, Ill	------	1
“ “	A. S. Capps	Illiopolis, “	------	1
Aug. 13	R. A. Clarke & Co	Colfax, Ind	4	
“ “	Stutzman & Pullenbaugh	Peru, “	9 hoe. 2	
“ 15	Beardsley & Sears	Lafayette, Ind	------	3
“ “	Robert Brisson	Terre Haute, Ind	------	2
“ “	P. Hinkley	Charleston, Ill	9 hoe. 1	
“ “	J. F. Drish	Mattoon, “	5	
“ “	Jacobs Bros	Columbus, O	------	2
“ 16	Seeley, Loyd & Co	Pittsfield, Ill	------	3
“ “	Hoover & Son	Hamilton, O	------	2
“ “	W. A. Waddell	Circleville, O	1	
“ “	W. H. Hill	Cincinnati, O	6	
“ 19	C. C. Yoder	Bennett's Sta	1	
“ “	Geo. E. Daniels	Iuka, Ill	5	
1879.				
Aug. 19	299 W. Miller	Broden, O.	1	
“ “	F. Shafer & Bro.	Decatur, Ind.	1	
“ 21	J. R. Harshberger	Marion, O.	------	2
“ 22	Elliott, Kelly & Co.	Burlington, Iowa	------	1
“ 23	Beardsley & Sears	Lafayette, Ind.	------	2
“ “	R. A. Clark	Colfax, “	------	2
“ “	H. Rhinestedler	E. St. Louis, Ill.	*	

*Car ag'l imp.

Date.	To whom shipped.	To what point.	No. of 8 hoe.	No. of 5 hoe.
1879.				
Aug. 23	Jno. J. McGavock	Nashville, Tenn.	2	
“ 25	N. W. Jones	Greggsville, Ill.		2
“ “	James Matters	Arcola, “	2	1
“ “	John G. Bryson	Brazil, Ind.	3	
“ “	S. B. Shaw	Mt. Carmel, Ill.	2	
“ 26	Beardsley & Sears	Lafayette, Ind.		2
“ “	C. E. Karmire	Shelbyville, “		3
July 25	James Matters	Arcola, Ill.	1	
“ “	Barrett & Foltz	Newton, Kan.		5
“ “	J. W. Snider	Middletown, O.	3	
“ 29	Beardsley & Sears	Lafayette, Ind.		3
“ 30	Hoover & Sons	Hamilton, O.		1
Aug. 2	Caldwell & McConnell	Manchester, Ill.		1
“ “	A. Traflick	New Britton, Ind.		1
“ “	Meyers & Wheeler	Flora, “		1
“ “	Jacobs Bros.	Columbus, O.		1
“ “	O. M. Scott	Marysville, O.		1
“ 4	Tinsley & Martin	Crawfordsville, Ind.		2
“ “	H. Rhinestedler	St. Louis, Mo.		6
“ 6	“	E. St. Louis, Ill.	*	
“ 7	R. A. Clark & Co.	Colfax, Ind.	4	
“ “	Jno. D. Scott	Farmer City, Ill.		1
“ “	A. Merchant	Vincennes, Ind.	9	
“ “	J. W. Snider	Middletown, “		1
1879.				
Aug. 7	300 J. C. Liggett	Ripley, O.		4
“ “	A. Capps	Illiopolis, Ill.	1	1
“ “	V. A. Parks	Decatur, “	1	
“ “	J. C. Brown	Lebanon, Ind.	1	
“ “	Beardsley & Sears	Lafayette, “	5	
“ “	Matt. Little	Craig, Mo.		2
“ 9	J. D. Inskip	Bellefontaine, O.		1
“ 11	C. E. Karmire	Shelbyville, Ind.		1
“ 12	Waddle, Caldwell & Depoy	Greenfield, O.	1	
“ 13	G. W. Hazelrigg	Thorntown, Ind.	5	
“ “	Beardsley & Sears	Lafayette, “	4	
July 10	E. C. Williams	Greensburg, “	1	
“ “	Wm. Thorn	Olney, Ill.	4	
“ 12	Geo. E. Daniels	Iuka, “	5	
“ 18	Hoover & Sons	Hamilton, O.	2	
“ 19	F. P. Dowell	Hartford City, Ind.	1	
“ “	Miksell & Gasell	Wabash, “	1	
“ “	Warren May	Sumner, Ill.	1	
“ “	L. Johnson	Vincennes, Ind.	1	
“ “	Wheeler & Robinson	McLeansboro', Ill.	1	
“ 22	S. K. Voorhees	Lewisville, Ind.		1
“ “	R. A. Clark & Co.	Colfax, “		1
“ “	J. S. Coleman	Morgantown, Ind.	1	
“ “	John Lands	Carmi, Ill.	5	
“ “	M. Nixon	Newport, Ind.	5	
“ 23	Murry & Fughner	Marion, “	8	
“ “	Rezin Metzger	Perrysville, “	1	
“ 24	H. Parks	Decatur, Ill.		1
“ “	N. W. Jones	Greggsville, Ill.		2
“ “	De Long & Co.	Lexington, Ky.		2
“ “	Meall & Riley	Maysville, “		3
1879.				
July 25	301 C. E. Merrifield	Indianapolis, Ind.	3	
“ “	R. Bryson	Terre Haute, “	5	

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* Car ag'l imp.

Date.	To whom shipped.	To what point.	No. of 8 hoe.	No. of 5 hoe.
1879.				
July 25	J. S. Coleman	Morgantown, Ind.	------	1
" "	W. H. Hill	Cincinnati, O.	------	3
" 26	Seeley, Loyd & Co.	Pittsfield, Ill.	------	5
" "	Geo. H. King	Marion, O.	1	
" 28	J. M. Clark	Craig, Mo.	------	2
June 2	Oliver Harley	Columbia City, Ind.	1	
" "	Cutter & Daniel	Iuka, Ill.	1	
" 4	H. May	Morris City	1	
" "	Geo. W. Mansfield & Co.	Rockport, Ind.	1	
" 9	Beardsley & Sears	Lafayette, "	1	
" "	John G. Bryson	Brazil, "	6	
" 10	A. B. Parks	Kendalville, Ind.	2	
" "	L. R. Stewart	Fostoria, O.	1	
" "	R. Ewing & Sons	Columbus Grove, O.	1	
" 12	Hagenbaugh & Bro.	Clinton, Ind.	1	
" "	Polk & Walker	Oaktown, "	1	
" 13	D. H. Lubker	Brownstown, Ind.	1	
" "	S. B. Shaw	Mt. Carmel, Ill.	1	
" 16	Brumer, Burton & Co.	Sullivan, Ind.	1	
" 25	J. J. McGavock	Nashville, Tenn.	1	
" 26	Gople & Decker	Batesville, Ind.	1	
" 27	Westcott & Co.	Xenia, "	1	
" "	B. C. Marlin	Salem, Ill.	1	
" "	Jacob Grost	Centalia, Ill.	1	
" "	J. H. Kelley	Winamac, Ind.	1	
" "	C. E. Hammond	Ashley, Ill.	1	
" "	E. C. McCaleb & Co.	Equality, "	1	
" 28	E. Cords & Co.	Terre Haute, Ind.	11	
" 30	W. H. Hill	Cincinnati, O.	5	
1879.				
July 3	302 C. E. Merrifield	Indianapolis, Ind.	3	
" 5	Morris Bros.	Rushville, "	------	1
" 8	H. Rhinestedler	E. St. Louis, Mo.	*	
" 9	Stutzman & Co.	Peru, Ind.	1	
1878.				
Sept. 1	Rogers & Remington	Greggsville, Ill.	------	2
" "	Wm. M. Modlin	New Castle, Ind.	------	2
" "	N. W. Jones	Greggsville, Ill.	------	3
" "	Geo. Nixon	Trenton, O.	------	1
" "	W. J. Snyder	Middletown, O.	------	1
1879.				
M'ch 20	H. Rhinestedler	St. Louis, Mo.	1	
Ap'l 12	" "	E. St. Louis, Ill.	*	
" 17	Barnett & Foltz	Newton, Kan.	1	
"	Wm. Galbraith	Tiffin, O.	1	
" 18	W. J. Snyder	Middletown, O.	1	
" 22	Coble & Haymeyer	Remberville, "	1	
" 23	Smith & Shepherd	Cory, "	1	
" 28	H. A. Rhodleheimer	Sidney, "	1	
" 30	C. S. Cooley	Bellefontaine, "	3	
May 1	Hoover & Sons	Hamilton, "	1	
" "	J. Doering	Wapakoneta, "	1	
" 2	Murry & Tughun	Marion, Ind.	2	
" 16	R. A. Clark & Co.	Colfax, "	1	
" "	Geo. W. Hazleing	Thorntown, Ind.	1	
" "	H. Rhinestedler	E. St. Louis, Ill.	*	
" 19	J. N. Whitehead	Laporte, Ind.	1	
" 23	W. H. Hill	Cincinnati, O.	1	

*Car ag'l imp.

Date.	To whom shipped.	To what point.	No. of 8 hoe.	No. of 5 hoe.
1879.				
May 27	E. Cards & Co.	Terre Haute, Ind.	1	
" "	J. M. Kirby	Upper Sandusky, O.	1	
" "	J. B. Banks	Weston, O.	1	
" 28	Armstrong & Co.	Tokomo, Ind.	1	
" "	M. N. Messick	Bedford, "	1	
" "	Mitchell Bros.	Chrisman, Ill.	1	
1877.				
Sept. 3	303 Geo. Shultz	Oxford, O.		1
" "	J. C. Leggett	Ripley, O.		2
" 4	Jacobs Bros.	Columbus, O.		4
" 5	Wm. Swofford	Walton, Ind.		1
" 6	J. Dickerson	West Jefferson, O.		1
" "	Jacobs Bros.	Columbus, O.		3
" 7	N. W. Jones	Greggsville, Ill.		2
" 8	Samuel Kain	Hamilton, O.		1
" 10	Hoover & Son	" "		2
" "	C. Richardson & Son	Madison, Ind.		1
" 11	G. & M. Kyger	Oxford, O.		1
" 13	Columbus Lake	Shawhans Sta., Ky.		4
" "	Thon & Reutchler	Hamilton, O.		1
" 14	Chas. E. Karmire	Shelbyville, Ind.		1
" "	L. Johnson	Vincennes, "		1
" 18	Geo. Ischler	McGonegles, O.		1
1878.				
July 30	McKing & Co.	Ripley, O.		2
Aug. 12	Seeley, Loyd & Co.	Pittsfield, Ill.		4
" 13	Hoover & Son	Hamilton, O.		3
" "	H. Parham	Lima, "		2
" 15	De Long & Co.	Lexington, K.		1
" 17	D. Lilleard	Marion, Ind.		1
" 20	N. W. Jones	Greggsville, Ill.		3
" 21	C. E. Karmire	Shelbyville, Ind.		5
" 29	John Hughley	Meir, "		1
" 30	A. M. Hall	Lewisville, "		1
" "	Hagenbaugh Bros.	Clinton, "		2
1878.				
Aug. 11	C. Late	Shawhang Sta., Ky.		6
" 15	Frank Lee	Lee's Landing, Ky.		1
" "	J. Wilder & Co.	Cincinnati, O.		2
" "	C. Z. Yoder	Smithsville Sta., O.		1
1877.				
Aug. 16	304 I. S. Wenger	Greenville, O.	1	
" 18	Rude Bros.	Franklin, Ind.		1
" 22	A. J. & E. T. Ice	Mt. Summit, Ind.		1
" "	Thos. B. Hunt	New Castle, "		1
" 23	Seeley, Loyd & Co.	Pittsfield, Ill.		2
" "	Jacobs Bros.	Columbus, O.		1
" 24	Seeley, Loyd & Co.	Pittsfield, Ill.		2
" "	Kilgore, Shirk & Co.	Peru, Ind.		1
" "	H. Parham	Lima, O.		1
" 27	A. J. & T. E. Ice	Mt. Summit, Ind.		1
" "	Jacobs Bros.	Columbus, O.		2
" 28	Ebal Futers	Goldsmith, Ind.		2
" "	J. C. Leggett	Ripley, O.		2
" "	John W. Neighbert	Milan, Ind.		1
" "	Jacobs Bros.	Columbus, O.		1
" 29	Chas. E. Karmire	Shelbyville, Ind.		4
" 30	D. C. Hoger	St. Louis Crossing, Ind.		1
" "	J. P. Watson	" " "		1
" "	D. H. Lubker	Brownstown, "		1

Date.	To whom shipped.	To what point.	No. of 8 hoe.	No. of 5 hoe.
1877.				
Aug. 31	Jacobs Bros.	Columbus, O.	------	1
Sept. 1	Hoover & Son	Hamilton, “	------	2
“ “	H. Parham	Lima, “	------	1
“ “	Jacobs Bros.	Columbus, “	------	1
“ 3	Samuel Kain	Hamilton, “	------	1
1876.				
July 21	Samuel Kain	“ “	------	3
“ 22	Seeley, Loyd & Co.	Pittsfield, Ill.	------	1
“ 24	L. S. Myer	Flora, Ind.	------	1
“ “	Hoover & Son	Hamilton, O.	------	1
Aug. 4	J. A. Wenger	Dayton, “	------	2
“ 12	Jacobs Bros.	Columbus, “	------	1
“ 17	Hampton & Bucher	Cincinnati, O.	------	1
1876.				
Aug. 18	305 De Long & Co.	Lexington, Ky.	------	1
“ 22	Chas. E. Karmire	Shelbyville, Ind.	------	5
“ 23	M. S. Meyer	Flora, “	------	5
“ 26	Frank Fox	Bellefontaine, O.	------	1
“ 28	Joseph W. Sample	McGonegles, “	------	3
Sept. 4	Lou. Rusk	Morris Sta., Ind.	------	1
“ 5	Elza M. Jennings	Lexington, “	------	1
“ 7	A. W. Hamilton	Franklin, “	------	2
“ 29	Hoover & Son	Hamilton, O.	1	
1877.				
Feb. 16	“ “	“ “	------	1
June 25	A. Hazan	Sunman, Ind.	------	2
July 7	W. S. Harter	Walker Sta., Mo.	------	1
“ 27	Hoover & Son	Hamilton, O.	------	2
Aug. “	Ranger & Hagenbaugh	Clinton, Ind.	------	4
“ “	R. S. Beeson & Son	Washington C. H., O.	------	1
“ 2	Seeley, Loyd & Co.	Pittsfield, Ill.	------	3
“ 7	Glasscock, Grimes & Co.	Hillsboro', O.	------	1
“ “	O. M. Scott	Marysville, O.	------	1
“ 8	Martin, Linsley & Co.	Crawfordsville, Ind.	------	2
“ 10	A. King	Ripley, O	------	1
“ 10	Waddle, Caldwell & Depoy	Greenfield, O.	------	1
1874.				
Aug. 22	S. M. Young	Terre Haute, Ind.	------	6
“ 24	“ “	“ “ “	------	6
“ 25	A. L. Thompson	Home, Ill.	------	2
“ 26	Wm. Swafford	Walton, Ind.	------	1
“ “	D. C. Hogee	Columbus, Ind.	------	1
“ 27	D. Lilleard	Meir, “	------	3
“ 28	Chas. Samond	Brookville, “	------	2
“ 31	W. A. Hamilton	Franklin, “	------	6
“ “	D. Shaffer	Hamilton, O.	------	2
Sept. 1	Holmes & McCollum	Seymour, Ind.	------	4
1874.				
Sept. 2	306 D. C. Hayer	Columbus, Ind.	3	
“ 3	D. Lilleard	Meir, “	------	2
“ 4	D. C. Hager	Columbus, “	1	1
“ 5	W. A. Hamilton	Franklin, “	------	6
“ 7	Samuel Kain	Hamilton, O.	------	1
“ “	Jacobs Bros.	Columbus, “	------	1
“ 8	Grover & Young	Terre Haute, Ind.	1	
“ “	Wm. Chamberlain	Springfield, Ill.	------	2
“ 12	W. A. Hamilton	Franklin, Ind.	------	6
“ “	J. W. Homer	Harrison, O.	------	1
“ 16	Alfred Sims	Eaton, Ind.	------	1
“ “	J. Norris	College Hill, Ky.	------	1
“ 21	T. M. Ridenour	College Corner, O.	------	1

Date.	To whom shipped.	To what point.	No. of 8 hoe.	No. of 5 hoe.
1875.				
May 26	Huber & Son	Hamilton, O.	------	1
July 3	Variety Iron Works	" "	------	1
" "	Kyger Bros.	Oxford, "	------	2
" 8	" "	" "	1	
" 24	A. L. Burge	St. Mary's, "	------	1
" 27	Henry Smoltzmire	Dillsboro', Ind.	------	1
" 28	J. J. McGavock	Nashville, Tenn.	------	1
" 29	S. M. Young	Terre Haute, Ind.	1	
" 31	J. Geo. Stilz	Indianapolis, "	------	1
Aug. 2	D. Lilleard	Meir, "	1	1
" 4	Cormine & Bro.	Goshen, "	------	1
" "	De Long & Co.	Lexington, Ky.	------	1
" 6	H. T. Foster	Beardstown, Ill.	------	1
" "	C. Caston	Chillicothe, Mo.	------	1
" 7	J. M. Gregory	Varnon, "	1	1
" 10	Robbins & Carter	Farmland, Ind.	------	6
" 16	Bone & Doble	Shelbyville, "	------	1
" "	P. A. Blackwell	Henderson, Ky.	------	1
1875.				
Aug. 18	307 I. S. Wenger	Wiley's Station, O.	1	1
" 21	Geo. Stilz	Indianapolis, Ind.	------	12
" 24	S. M. Young	Terre Haute, "	7	
" 28	Ball & Culbertson	Horrightstown, Ind.	------	2
" 31	H. Smoltzmire	Dillsboro', O. (should be Ind.)	------	2
Sept. 3	S. M. Young	Terre Haute, Ind.	7	1
" 13	Sam'l Kain	Hamilton, O.	------	1
" 15	W. S. Baird	Ripley, O.	------	1
1876.				
May 31	Henry Smolzmire	Friendship, Ind.	1	1
" "	Laborious Drill	Harman Sta., Ind.	1	1
July 6	Frank Fox	Bellefontaine, O.	------	1
" 7	Adam Kellman	Greenville, "	------	1
" 20	Haward & Gyer	Martinsville, Ind.	------	1
" 21	Hoover & Son	Hamilton, O.	------	1
1880.				
June 18	John Marshall	Mansfield, O.	5	
" 21	A. K. Lane & Sons	Shawneetown, Ill.	1	
" "	Burtis & Brinkman	Mt. Vernon, Ind.	1	
" 22	Jacob Fries	Bremen, "	1	
" 23	Elza M. Jennings	Lexington, "	1	
" 26	James Matters	Arcola, Ill.	1	
" "	Avery & Wiles	Marysville, Mo.	8	
" 28	Geo. E. Daniels	Iuka, Ill.	5	3
" 29	R. Maxwell	Albany, Ind.	1	
" "	John Davis & Son	Sullivan, "	11	
July 2	D. H. Lubker	Brownstown, Ind.	1	
" "	A. W. McKinney	Red Key, "	1	
" "	John Marshall	Mansfield, O.	*	
June 1	B. Judy	London, "	1	
" 2	Goupel & Decker	Batesville, Ind.	1	
" 3	H. P. Wetzel, ag't, Ind'p'l's, for H. Rhinestedler.	E. St. Louis, Ill.	*	
1880.				
June 3	308 Waddell & Depoy		1	
" "	F. Shaffer & Bro.	Decatur, Ind.	6	
" 4	P. Hasfield	Wood's Sta., O.	1	
" "	Fulton, Crane & Peters	Washington, "	1	
" 7	J. C. Pearce	Ridge Farm, Ill.	10	
" "	F. Leech & Co.	Danville, Ky.	1	

*Ag'l imp.

Date.	To whom shipped.	To what point.	No. of 8 hoe.	No. of 5 hoe.
1880.				
June 7	J. K. Pleasant	Vevay, Ind.	1	1
“ “	Overbacker & Caldwell	Southworth, Ind.	1	
“ “	Cole & Gibson	Holgate, “	-----	2
“ 8	V. H. Parks	Decatur, Ill.	-----	5
“ “	De Long & Co.	Lexington, Ky.	10	
“ 10	H. P. Wetsel, ag't for J. G. Bryson.	Terre Haute, Ind.	*	
“ “	Jno. W. Neighbert	Milan, “	1	
“ “	Adam Cully	Geneva, “	1	
“ 11	R. A. Clark	Colfax, “	10	1
“ 12	M. S. Bowlen	Tipton, “	---	Three. 1
“ “	B. F. Alford	Anderson, “	---	Three. 1
“ “	Mooney, Taylor & Smith	Indianapolis, “	1	
“ “	Loyd & Beddinger	Harrison, O.	1	
“ 14	Beardsley & Sears	Lafayette, Ind.	10	
“ “	Wm. Snyder	Fowler, “	1	
“ 15	Lewis Stevens	Columbus, “	2	
“ 16	John W. Littlejohn	Madison, “	1	
“ 18	H. P. Wetsel, ag't for Buckley & Brock.	Mackinaw, Ill.	*	
May 14	Peter Staley	Naponee, Ind.	1	
“ 15	John Weir	Ligoner, “	1	
“ 17	Wm. Tibbett	Rochester, “	1	
“ 18	McKinney & Moore	Bunker Hill, Ind.	1	
“ “	Tyler, Horning & Co.	North Manchester, Ind.	1	
“ “	W. H. Coffin	Oakland, Ill.	1	
“ “	C. E. Nofsinger & Co.	Denver, Ind.	1	
1880.				
May 18	309 P. Hinkley	Charleston, Ill.	1	
“ “	T. D. Voris	Neogo, “	-----	1
“ “	T. P. Dowell	Hartford city, Ind.	1	
“ 24	H. P. Wetsel, ag't Imp., for H. Rhinestedler.	St. Louis, Mo.	†	
“ 26	H. A. Rhodehamel	Sidney, O.	1	
“ “	R. Ewing	Columbus Grove, O.	-----	1
“ 27	C. J. Sabine	Champaign, Ill.	-----	1
“ “	C. H. Giddings	Danville, Ill.	4	2
“ “	J. H. Mayner	Elwood, Ind.	1	
“ “	T. J. Cappy	S. Whitley, Ind.	1	
“ “	Surrell & Vanarster	Tolmo, Ill.	6	2
“ “	J. C. Brown	Lebanon, Ind.	1	
“ “	Miller & Keller	Forest, Ill.	1	
“ “	Patterson & Tomlinson	Logansport, Ind.	1	
“ “	L. R. Stewart	Fostoria, O.	1	
“ 29	J. M. Lockwood	Sturgis, Mich.	3	
“ 31	John H. Kelly	Winnemac, Ind.	4	
“ “	S. B. Shaw	Mt. Carmel, Ill.	4	
“ “	Porter & Franklin	Albion, Ill.	1	
“ “	E. B. Pierson	Coldwater, O.	1	
Ap'l 13	Lesh Brickley	Bluffton, Ind.	1	
“ “	A. J. & E. T. Ice	Mt. Summitt, Ind.	1	1
“ “	Lake & Cable	Pemberville, O.	1	
“ 14	A. Turner	Franklin, “	-----	1
“ “	T. S. Merrill & Co.	Toledo, “	7	
“ “	Wm. Galbrath	Tiffin, “	2	
“ “	R. B. McGrigory	Zionsville, Ind.	1	

* Car ag'l imp.
† Ag'l imp.

Date.	To whom shipped.	To what point.	No. of 5 hoe.	No. of 8 hoe.
1880.				
Ap'l 16	J. H. Pattison	St. Mary's, O.	1	
" "	Johnson & Burke	Edgerton, "	3	
" 19	Cole & Gibson	Holegate, "	4	1
1880.				
Ap'l 20	310 R. Merrill	Spencer, Ind.	2	
" "	W. D. Carlin	Noblesville, Ind.	------	1
" 23	King, Kendall & Co.	Endfield, Ill.	1	
" 24	R. Bryson	Worthington, Ind.	2	
" "	Lewis & Stevens	Columbus, "	7	
" 26	Mitchell Bros.	Crissman, Ill.	2	
" "	J. R. Mill	Covington, Ind.	1	
" 28	H. P. Wetsell, ag't Vandalia	Marshall, Ill.	*	
" "	line, for Archer & Tully.			
" 29	J. R. Wilson	Bellefontaine, O.	1	
May 7	Miller & Guthridge	Martinsville, Ind.	1	
" "	D. H. Gable	Greenfield, "	1	
" "	Hubbard & Fry	Bainbridge, "	1	
" "	G. W. Hazelrigg	Thorntown, "	1	
" "	Allen & Merwin	Cloverdale, "	1	
" "	O. P. Griffith	Connersville, "	1	
" "	Wyeswanger & Shafer	Troy, O.	------	1
" 13	R. Swisher	New Madison, O.	1	
1879.				
Sept. 23	J. C. Buckles & Co. for J. J. McGavock.	Nashville, Tenn.	1	
" 26	J. C. Buckels & Co. for J. J. McGavock.	" "	1	
" 29	Frank Allen	Vevay, Ind.	------	1
1880.				
Feb'y 2	Deer, Mansur & Co.	Kansas City, Mo.	------	1
" 16	H. Rhinestedler	E. St. Louis, Ill.	1	
" "	M. H. & J. H. Wagner	Prospect Park, Ill.	1	
" 19	Ainsworth & Bonebright	Des Moines, Iowa	1	
" 24	Johnson & Burke	Edgerton, O.	1	
" 28	Lucas & Stevens	Columbus, O.	1	
M'ch 2	J. C. Buckels & Co.	Cincinnati, "	1	
" 6	John Marshall	Mansfield, "	1	
1880.				
M'ch 16	311 Beckley & Brock	Mackinaw, Ill.	1	1
" 22	F. Scholl & Co.	Toledo, O.	1	
" 24	Dayton Malleable Iron Co.	Dayton, O.	------	1
" 25	Archer & Son	Marshall, Ill.	1	
" "	Ray, Rice & Sherwood	Camden, Ind.	1	
" "	L. S. Gilbert	Harper, Iowa	9 hoe. 1	1
" "	H. & J. W. Adams	Fentonville, N. Y.	1	
" 27	T. S. Merrill	Toledo, O.	1	1
" "	R. S. McColby & Son	Tontogany, O.	1	
" 29	J. B. Mahan	Dunkirk, "	1	
" "	J. C. Buckels & Co.	Centre, "	------	1
Ap'l 5	H. P. Wetsell, ag't Vandalia line, for H. Rhinestedler.	St. Louis, Mo.	*	
" 6	Beckles & Brock	Mackinaw, Ill.	1	1
" 10	H. P. Wetsell, ag't Vandalia line, for H. Rhinestedler.	E. St. Louis, Ill.	*	
" 13	Blackledge & Falkner	Anderson, Ind.	3	
" "	Ruben Thompson	Muncie, "	6	6

* Ag'l imp.

Date.	To whom shipped.	To what point.	No. of 5 hoe	No. of 8 hoe.
1879.				
Sept. 4	Westcott & Co.	Xenia, Ill.	1	
" 5	J. G. Bryson	Brazil, Ind.	4	
" 6	H. Rhinestedler	E. St. Louis, Mo.	12	
" "	W. J. Snyder	Middletown, O.	2	
" 8	Beardsley & Sears	Lafayette, Ind.	4	
" "	W. J. Snyder	Middletown, O.	2	
" "	G. Decamp	Oxford, "	1	
" 9	Shultsman & Pillbaugh	Peru, Ind.	9 hoe. 2	
" "	John G. Bryson	Brazil, "	6	
" "	R. A. Clark	Colfax, "	2	
" "	D. H. Lubker	Brownstown, Ind.	2	
" 11	J. C. Leggett	Ripley, O.	------	2
" "	J. J. McGavock	Nashville, Tenn.	------	2
1879.				
Sept. 12	312 H. Rhinestedler	E. St. Louis, Ill.	6	
" "	R. Bryson	Clay City, Ind.	2	
" 15	C. E. Karmere	Shelbyville, Ind.	------	2
" "	H. Rhinestedler	E. St. Louis, Ill.	4	
" "	S. H. Rhodehamel	Sidney, O.	2	
" 16	S. B. Shaw	Mt. Carmel, Ill.	2	
" "	C. E. Karmere	Shelbyville, Ind	------	3
" 17	P. Bryson	Terre Haute, "	2	
" 18	C. E. Karmere	Shelbyville, "	------	2
" "	W. H. Hill	Cincinnati, O.	------	4
" 21	"	" "	------	1
" "	G. B. Gibson	Rising Sun, Ind.	1	
" "	J. C. Buckles & Co. for J. J. McGavock.	Nashville, Tenn.	2	
Aug. 27	M. Settle	Craig, Mo.	------	1
" "	J. C. Perry	Goodland, Ind.	9 hoe. 1	
" "	R. A. Clark	Colfax, "	------	3
" "	F. Shafer & Bro.	Decatur, "	2	
" "	W. H. Hill	Cincinnati, O.	2	
" "	Hoover & Son	Hamilton, "	2	
" 28	Seeley, Loyd & Co.	Pittsfield, Ill.	------	2
" 29	H. A. Rhodenhamer	Sidney, O.	1	
" 30	S. B. Shaw	Mt. Carmel, Ill.	4	
" "	Beardsley & Sears	Lafayette, Ind.	2	
" "	Stutesman & Pillsbaugh	Peru, Ind.	2	
" "	R. A. Clark & Co.	Colfax, "	2	
" "	Caleb Hagemire	Pembervile, O.	9 hoe. 1	
" "	P. B. Dutton	New Bloomington, O.	------	1
" "	Jacob Bros.	Columbus, O.	------	2
" "	W. H. Hill	Cincinnati, "	2	
Sept. 1	J. G. Bryson	Brazil, Ind.	3	
" "	Beardsley & Sears	Lafayette, Ind.	------	3
1879.				
Sept. 1	313 F. P. Dowell	Hartford City, Ind.	3	
" 2	P. Hinkley	Charleston, Ill.	2	
" "	J. G. Buckles, contr. for J. McGavock.	Nashville, Tenn.	2	
" "	H. A. Rhodenhanne	Sidney, O.	1	
" 4	Seeley, Loyd & Co.	Pittsfield, Ill.	------	2
" "	Martin & Linsley	Crawfordsville, Ind.	------	2
" "	J. D. Scott	Farmer City, Ill.	------	1
" "	A. S. Capps	Illiopolis, "	2	
" "	P. A. Clark	Colfax, Ind.	2	

Date.	To whom shipped.	To what point.	No. of 8 hoe.	No. of 5 hoe.
1879.				
Aug. 15	Beardsley & Sears	Lafayette, Ind.		3
" "	Robert Bryson	Terre Haute, Ind.		2
" "	P. Hinkley	Charleston, Ill.	9 hoe. 1	
" "	J. F. Drish	Mattoon, "	5	
" "	Jacobs Bros.	Columbus, O.		2
" 16	Seeley, Loyd & Co.	Pittsfield, Ill.		3
" "	Hoover & Sons	Hamilton, O.		2
" "	W. A. Caldwell	Circleville, O.	1	
" "	W. H. Hill	Cincinnati, "	6	
" 19	C. C. Yoder	Bennett's Sta., Ind.	1	
" "	Geo. E. Daniels	Iuka, Ill.	5	
" "	M. Miller	Broden, O.	1	
" "	F. Shafer & Bro.	Decatur, Ind.	1	
" 21	J. R. Hastberger	Marion, O.		2
" 22	Elliott, Kelley & Co.	Burlington, Iowa		1
" 23	Beardsley & Sears	Lafayette, Ind.		2
" "	P. A. Clark	Colfax, "		2
" "	H. Rhinestedler	E. St. Louis, Ill.	*	
" "	J. C. Buckles & Co., contr. for J. G. McGavock.	Nashville, Tenn.	2	
" 25	N. W. Jones	Greggsville, Ill.		2
" "	James Matters	Arcola, "	2	1
" "	John G. Bryson	Brazil, Ind.	3	
1879.				
Aug. 25	314 S. B. Shaw	Mt. Carmel, Ill.	2	
" 26	Beardsley & Sears	Lafayette, Ind.		2
" "	C. E. Karmire	Shelbyville, "		3
" 27	J. F. Dresh	Mattoon, Ill.	4	
" "	Post & Barton	Taylorsville, Ill.		5
July 29	Beardsley & Sears	Lafayette, Ind		3
" 30	Hoover & Sons	Hamilton, O.		1
Aug. 2	Caldwell & McConnell	Manchester, Ill.		1
" "	A. Traflic	New Britton, Ind.		1
" "	Myers & Wheeler	Flora, "		1
" "	Jacobs Bros.	Columbus, O.		1
" "	O. M. Scott	Marysville, O.		1
" "	Linsley & Martin	Crawfordsville, Ind.		2
" "	H. Rhinestedler	St. Louis, Mo.		6
" "	"	E. St. Louis, Ill.	†	
" "	R. A. Clark	Colfax, Ind.	4	
" "	Jno. D. Scott	Farmer City, Ill.		1
" "	A. Merchant	Vincennes, Ind.	9	
" "	J. W. Snyder	Middletown, O.		1
" "	J. C. Laggett	Ripley, "		4
" 9	A. Capps	Illiopolis, Ill.	1	1
" "	V. A. Parks	Decatur, "	1	
" "	J. C. Brown	Lebanon, Ind.	1	
" "	Beardsley & Sears	Lafayette, "	5	
" "	Mat. Little	Craig, "		2
" "	J. D. Inskip	Bellefontaine, O.		1
" 11	C. E. Karmire	Shelbyville, Ind.		1
" 12	Waddell, Caldwell & Co.	Greenfield, O.	1	
" 14	Geo. W. Hazellrigg	Thorntown, Ind.	5	
" "	Beardsley & Sears	Lafayette, "	4	
" "	R. A. Clark	Colfax, "	4	

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* Ag'l imp.
† Car ag'l imp.

Date.	To whom shipped.	To what point.	No. of 8 hoe.	No. of 5 hoe.
1879.				
Aug. 14	315 Stutsman & Pillsbaugh	Peru, Ind.	2	
July 18	Hoover & Sons	Hamilton, O.	2	
" 19	F. P. Dowell	Hartford City, Ind.	1	
" "	Mikesell & Lasell	Wabash, "	1	
" "	Warren May	Sumner, Ill.	1	
" "	L. Johnson	Vincennes, Ind.	1	
" "	Wheeler & Robinson	McLeansboro', Ill.	1	
" 22	S. K. Vorie	Lewisville, Ind.		1
" "	R. A. Clark & Co.	Colfax, "		1
" "	J. S. Coleman	Morgantown, Ind.	1	
" "	John Lands	Carmi, Ill.	5	
" 22	M. Nixon	Newport, Ind.	5	
" 23	Murry & Fughmer	Marion, Ind.	8	
" "	Roger Metzger	Perrysville, Ind.	1	
" 24	V. H. Parke	Decatur, Ill.		1
" "	N. W. Jones	Griggsville, Ill.		2
" "	De Long & Co.	Lexington, Ky.		2
" "	Meall & Ribey	Maysville, "		3
" 25	C. E. Merrifield	Indianapolis, Ind.	3	
" "	R. Bryson	Terre Haute, "	5	
" "	J. S. Coleman	Morgantown, "		1
" "	W. H. Hill	Cincinnati, O.		3
" 26	Seeley, Loyd & Co.	Pittsfield, Ill.		5
" "	Geo. H. King	Marion, O.	1	
" 28	J. M. Clark	Craig, Mo.		2
" "	James Matters	Arcola, Ill.	1	
" "	Barrett & Foltz	Newton, Kan.		5
" "	J. W. Snider	Middletown	3	
1874.				
Aug. 4	Whittenberg & Hamilton	Cincinnati, O.		4
" 6	" " "	" "		8
" 8	E. L. Beck	Kokomo, Ind.		1
1874.				
Aug. 8	316 Morgan, Greene & Co.	Indianapolis		6
" "	D. W. Fairbanks	Jacksonville, Ill.		1
" 11	D. C. Heyer	Columbus, Ind.	1	1
" 12	H. D. Dunnington	Greencastle. Ind.		1
" "	Dennett, care Regan & Mouchaut.	Maysville, Ky.		6
" 13	Grubb, Martin & Co.	Crawfordsville, Ind.		3
" "	Ball & Culbertson	Knightstown, "		1
" "	W. F. Parker	Lagrange, Ky.		1
" 14	S. M. Young	Terre Haute, Ind.		3
" "	H. D. Duddington	Greencastle "		2
" 15	J. W. Bishop	Winchester, "		3
" "	A. L. Thompson	Homer, Ill.		1
" "	Richard Verbryck	Topeka, Mason Co., Ill.		2
" 18	J. W. Bishop	Winchester, Ind.		3
" "	Withenberg & Hampton	Cincinnati, O.		7
" 19	J. Cline	Pattersburg, O.		1
" "	O. M. Scott	Marysville, "		1
" 20	Wm. Hamilton	Franklin, "		6
" "	G. & H. Kyger	Oxford, O.		1
" 21	J. G. Gagle	Dayton, "		1
" "	J. W. Homer	Harrison, O.		1
" "	Graner & Young	Terre Haute, Ind.	3	
" "	Lamb Kain	Hamilton, O.		1
June 27	S. M. Young	Terre Haute, Ind.		1
" 29	H. D. Duddington	Greencastle, "		1
" "	A. J. Banks	Greenfield, "		1

Date.	To whom shipped.	To what point.	No. of 8 hoe.	No. of 5 hoe.
1874.				
July 1	Campbell & Horton	Crawfordsville, Ind.		1
" 10	R. S. Forbet	Thorntown, "		1
" 14	A. McKew	Ridgeville, "		1
" "	J. G. Gagle	Dayton, O.		1
" 15	Geo. Robbins	Farmland, Ind.		1
1874.				
July 18	317 Leedy Bros. & Co.	Carthage, Mo.		1
" 21	S. M. Young	Terre Haute, Ind.		6
" "	Withenberg & Hampton	Cincinnati, O.		6
" 22	S. M. Young	Terre Haute, Ind.	1	
" "	J. W. Bishop	Winchester, "		6
" 24	T. W. Hall	Lewisville, "		2
" "	Hoosier Drill Co.	Milton, "		1
" "	W. A. Hamilton	Franklin, "		6
" "	Dan. Shafer	Hamilton, O.		2
" "	Wm. M. Mitchell & Co.	Richmond, Ind.		2
" 27	Edson & De Groot	Eaton, O.		1
" 28	Holnus & McCollum	Seymour, Ind.		3
" 30	R. S. Torbet	Thorntown, Ind.		2
" "	S. M. Young	Terre Haute, "		6
" 31	Chas. Samonal	Brookville, "	1	1
Aug. 4	Geo. Robbins	Farmland, "		2
" "	D. Lilleard	Meir, "		2
" "	J. M. Bishop	Winchester "		6
" "	Squire Packer	Richmond, "	1	
1873.				
July 26	Engle & Bishop	Mt. Summit, Ind.		1
" 28	Armstrong & Co.	Kokomo, "		1
" "	Ebal Teeter	Tipton, "		4
" "	Hunt & Wales	Xenia, "		1
" "	Loyd & Davidson	Pittsfield, Ill.		1
" 29	Beardsley & Sears	Lafayette, Ind.		1
Aug. 6	Corry, W—— & Co.	Cincinnati, O.	1	
" 12	Rude Bros.	Indianapolis, Ind.	*	
" "	D. M. Marshall	Hiawatha, Ks.		1
" "	D. Sampson	Cicero, Ind.		1
" 21	C. H. Harden	Cincinnati, O.		1
" "	J. Metzger	" "		1
1873.				
Aug. 21	318 F. M. Duckwell	Cincinnati, O.		1
" "	D. S. "	" "		1
" "	G. W. Duckwell	" "		1
" "	Thomas Marsh	" "		1
" "	Mose Duckwell	" "		1
" "	Dan'l Shafer	Hamilton, "		1
" 22	Bone & Doble	Shelbyville, Ind.		1
" "	Thomas & Co.	Springfield, O.		6
" "	Davis & Hammond	Dayton, "		1
" "	Lewis McKeever	Cincinnati, "		1
" "	Wm. Peterson	" "		1
" "	J. R. Needham	" "		1
" 23	John Appleton	Hamilton, "		1
" 26	James Bowman	Oxford, "		1
" "	S. Duboise	" "		1
" "	James Dave	" "		1
" "	Thomas, L. & Co.	Springfield, "		6
" "	S. Dial	Cincinnati, "		1
" "	E. G. Penn	" "		1
" 27	Loyd & Davidson	Pittsfield, Ill.		3

*Car grain drills.

Date.	To whom shipped.	To what point.	No. of 8 hoe.	No. of 5 hoe.
1873.				
Aug. 28	T. W. Lippincott	Pana, Ill.		3
" "	M. Applegate	Cincinnati, O.		1
" 29	Wilcoxon & Co.	Muncie, Ind.		3
" "	Hearsly & Sales	Falls City, Neb.	2	12
" 30	S. D. Wilbourne	Fountaintown, Ind.		1
Sept. 2	Loyd & Davidson	Pittsfield, Ill.		2
" "	D. Lilliard	Meir, Ind.		1
" 5	G. W. Robbins	Farmland, Ind.		1
" "	Engle & Bishop	Winchester, "		3
" "	Smith & Pearce	New Castle, "		3
" "	Loyd & Davidson	Pittsfield, "		2
1873.				
Sept. 5	319 Fry & Flint	Kenton, O.		1
" "	D. Lilliard	Meir, Ind.		1
" 6	N. W. Jones	Greggsville, Ill.		3
" "	Geo. Harrison	East Lynn, "		1
" 9	Wm. Chamberlain	Springfield, "		6
" "	T. W. Lippincott	Pana, "		3
" "	D. Lilliard	Meir, Ind.		1
" 11	Patrick Carmichael	Muncie, "		1
" 15	Hauck, Spencer & Co.	Indianapolis, "		1
" 24	Carey, Withenberg & Hampton.	Cincinnati, O.		2
1872.				
Sept. 12	Wm. Grear	Connersville, Ind.		1
" 14	L. Peterson	" "		1
" "	E. Coe	" "		1
" "	W. R. Lewiston	Brownsville, "		1
" "	Madison Jones	" "		1
" 18	Houck, Spencer & Co.	Indianapolis, "		2
Oct. 1	Morris Bros.	Rushville, "		1
1873.				
Apr. 30	Variety Iron Works	Hamilton, O.		1
May 4	Burber Bros.	Oxford, "		2
" 30	Hershley & Sayles	Falls City, Neb.		1
July 12	M. S. Dennett	Maysville, Ky		4
" 16	W. A. Hamilton	Franklin, Ind.		1
" "	Ebal Teeters	Tipton, "		1
" "	Hershley & Saylor	Falls City, Neb.		1
" 18	Holmes & Jones	Seymour, Ind.		3
" 19	R. Marks	Connersville, "		1
" "	Wilcox & Co.	Austin, "		1
" "	Smith & Penn	New Castle, "		1
" "	P. W. Laycock	Higgensport, O.		1
" "	C. C. Jones	" "		1
" "	G. R. Shields	" "		1
1873.				
July 23	320 R. Marks	Connersville, Ind.		1
" "	S. Wilcoxon	Muncie, "		1
" "	Cary, Witherberg & Co.	Cincinnati, O.		6
" 24	M. S. Dennett, care John Rogers.	" "		8
" 25	Corey, W. & H.	" "		1
" "	Wm. West	Mt. Summit, Ind.		2
1872.				
July 29	Houck, Spencer & Co.	Indianapolis, "		6
" "	Charles Hurst	Marion, "		1
" "	Lugarden & Harden	Colfax, "		1
" "	Geo. W. Redsell	Vienna, "		1

Date.	To whom shipped	To what point	No. of 8 hoe.	No. of 5 hoe.
1872.				
Aug. 1	Jacobs Bros.	Columbus, O.		1
" 5	Joseph Shaffer	Oxford, "		4
" 8*	Sadler Bros.	" "		2
" 17	Henry B. Lucas	Vienna, Ind.		
" 21	Houck, Spencer & Co.	Indianapolis, Ind.		1
" 22	Thomas, Ludlow & R.	Springfield, O.		6
" 28	Jacob Redpath	Muncie, Ind.		1
" 30	Thomas Laoz	Brownsville, "		1
" "	Wm. Churchill	Rushville, "		2
" 31	Wilson & Co.	Muncie, "		2
" "	Smalle & Bierce	New Castle, "		3
" "	Houck, Spencer & Co.	Indianapolis, "		6
Sept. 2	Wm. Griggs	Griffins, "		1
" "	Wm. Smith	" "		1
" 3	Kidwell & Lucas	Connersville, "		1
" 4	H. B. Lucas	Vienna		2
" "	J. Dobson	Anderson, "		1
" 6	J. W. Holmes	Woods' Sta., "		1
" 9	Smith & Spencer	New Castle, "		2
Aug. 10*	Houck, Spencer & Co.	Indianapolis, "		6
" "	Geo. Crist	Philadelphia		1
" "	Bone & Doble	Shelbyville, "		1
" 13	Jos. Shaffer	Oxford, O.		2

321 Comes now the parties, and this examination is now proceeded with this January 13th, 1882.

Question. Have you prepared a statement of the number of drills that have been shipped by the defendants from the freight-forwarding books in your office, as per agreement of the parties hereto at the date of the adjournment on the 29th day of December, 1881?

Answer. I have, as far as I had the books; all the books called for in the subpœna were not there.

Question. State the books that are missing, as near as you——

Answer. I think the statements by me commence late in 1871, and this is the oldest book I had. The older ones have been returned to the company. I have the books from that time to the present, and my statement covers that entire period.

Question. Are you the custodian of those books, as the agent of the railroad company?

Answer. I am.

Question. Have you included in your statements the entries of receipt and shipment of all drills made by the railroad company for the Rude Bros., as shown by and included in the said books, during the time above mentioned?

322 Answer. I have, to the best of my knowledge, errors excepted.

Question. Did you examine all the said books for the time mentioned, with a view to making such statements, and are there any omissions, to your knowled- or belief?

Answer. I examined all the books and every item in the books, and there are no omissions, to my knowledge.

Question. Have there been any shipments of drills by the Rude Bros. during the time mentioned of which you have knowledge that are not included in said statement?

Answer. None, that I know of.

Question. Were the items in the statement copied from the books, and are they correct?

Answer. They were copied from the books, and to the best of my knowledge and belief they are correct.

Cross-examination by Mr. Stem, counsel for defendants:

Question. Have you ever seen and examined the letters patent sued on in this case?

Objected to by counsel for plaintiff- because the same is not a proper cross-examination and is not responsive — the examination-in-chief and is irrelevant and immaterial.

Answer. I do not know what they are even.

Question. Do you know the construction of the feeding devices and other operating parts of these various drills shipped by the Rude Bros.?

323 Objected to by counsel for plaintiff- for the reasons given to the previous questions.

Answer. I believe I do.

Question. Were they all alike, with the exception of the difference in the number of hoes?

Objected to for the reasons above by counsel for the pl'ff-.

Answer. No, sir; I think they have made three different kinds of feed that I know of. They may have made more.

Question. Can you state whether any of these drills had the feeding cylinder cored out so as to have a bearing upon the driving shaft shorter than the cylinder?

Objected to for the aforesaid reasons by counsel for the pl'ff-.

Answer. I think the first drills they made were that way. I am not certain. Some of the others were supported at one end by a shaft and the other end upon a rosette; the last or other ones I don't know how they were supported.

Question. How many, if you know, of these drills were constructed with the bearing of the cylinder on the shaft shorter than the cylinder itself?

Objected to by the plaintiffs' counsel for the reasons given to the other questions.

324 Answer. I don't know; I can't state any number, for those that had the rosette the bearing on the shaft was shorter than the cylinder.

Question. How large a proportion of these drills, if you know, were constructed with the bearing of the cylinder in the shaft shorter than the cylinder itself?

Objected to by counsel for the plaintiff- for the reasons given to other questions.

Answer. It was a very small proportion of the eight-hoed drills. Of the five hoed I can't say anything.
Question. Were any of these drills constructed with an oblique discharge; if so, how many and what proportion?

Objected to by pl'ff-' counsel for the reasons stated to the other questions.

Answer. I cannot state, for I don't know.
Question. How many, if you know, were constructed with a removable shaft?

Objected to by plaintiff- for reasons above given.

Answer. I don't know.
Question. State whether any of these drills were shipped back to the Rude Bros.

Objected — by plaintiff- for reasons above given.

Answer. Yes; there was.
Question. Can you state how many?

Objected to for reasons given above by plaintiffs' counsel.

Answer. I cannot.
325 Question. Will any of the freight books in your possession show the number of drills shipped back to the Rude Bros.?

Objected to by plaintiffs' counsel, and it is here agreed by counsel for plaintiff- and defendant- that the same objection shall be made to all questions unless otherwise indicated.

Answer. The freight-receiving books will show all the drills they have received during the dates of those books, and I think I have all the books between the dates given, from 1872 to the present time.
Question. Were these drills that were shipped back the same that had been shipped away by the Rude Bros.?
Answer. They were their manufacture and were the same kind — drills shipped away, and I know some of them were the same.

Re-examination:

Q. Did you examine all the drills that have been shipped, as shown by your statement, for the purpose of examining the cylinders on the driving shaft, and do you now remember the kind of bearings that were used on those drills?
Ans. I did not.
Q. Have you paid particular attention to the bearings and feeding devices on the drills manufactured by the Rude Bros. during the time mentioned?

Ans. I don't know that I have paid particular attention all
326 the time. I have examined their feeds a great many times, though, and studied them.

Question. Will you examine the freight-receiving books and ascertain from them and make to the examiner, under oath, a statement of the number of these drills shipped back and that character, with the dates as shown by the books?

Answer. I will.

It is here agreed by the counsel hereto that the witness may prepare the statement above called for and submit it to the examiner when completed and attach it as part of this deposition when duly verified by the witness, the examination to be continued until January 27th, 1882.

J. M. WESTCOTT *vs.* RUDE BROS. *et al.*

LIBERTY, *March 14th*, 1882.

Comes now again the parties, by their counsel, and the taking of this evidence is by agreement continued and all irregularities in adjournment, etc., *is* waived.

HENRY C. HAM, witness, says:

Question. State whether or not you have prepared the statement from the books of the railroad company asked for in the last question.

327 Answer. No; I have not.

Question. Why not?

Answer. Because I did not have all the books mentioned.

Question. Why did you not have the books, and where are they?

Answer. I suppose the books were sent to the general freight office—they are not about this office—and I so reported to Mr. Evans, the examiner.

Question. Please state, from your own knowledge, as near as you can, how many of these drills shipped from here by these defendants were returned to them through this freight office.

Objected to as not being proper cross-examination, and as irrelevant and immaterial.

Answer. I was not here at all the time that these drills were shipped away from here. Since I have been here I would think there was between two and three hundred; I am pretty sure over two hundred; there might be three hundred.

Question. When did you take charge of this office?

Answer. In September, 1873.

Question. Then, to the best of your knowledge, between two and three hundred drills have been returned to the defendants through this freight office since 1873?

Objected to for reasons above stated.

328 Answer. Yes, sir.

Re-examined by Mr. Fox:

Question. Can you give the dates and numbers of the drills said to be returned?

Answer. I can't give them from memory.

Question. In giving the numbers you have, do you speak from memory or from books?

Answer. From memory.

Question. How do you know they were the same drills shipped away?

Answer. I knew the drills, and in most cases I knew when shipped and who shipped to, and I knew they were returned from the same parties.

Question. Do you mean to say you can identify each drill?

Answer. No.

Question. Have you an independent recollection, aside from your shipping books, of the parties to whom the Rude Bros. have shipped drills prior to 1876?

Answer. I have, of some of them.

Question. Have you an independent recollection of the drills returned, independent of the books? If so, state the names of persons and number of drills returned prior to 1876.

Answer. I can't tell whether it was prior to 1876. I recollect of drills returned and who returned them; some returned from Terre Haute. I don't know how many—2 or 3 8-hoed and several
329 5-hoed—and I don't know whether Wring returned them or not, or his assignee. I remember W. E. Hampton returned some 20 odd when he failed; the balance are small and I can't remember names. I think Miller, near Muncie, sent back several. I don't remember any other drills just at present, and I don't remember the persons or parties. I remember other drills coming back, but don't remember times or parties.

H. C. HAM.

STATE OF INDIANA, *Union County:*

JOHN M. WESTCOTT *et al. vs.* SQUIRE B. RUDE *et al.*

I, Thomas D. Evans, special examiner in this case and notary public in and for Union county, Indiana, hereby certify that the above-named witness, Henry C. Ham, was by me first duly sworn according to law to testify to the truth, the whole truth, and nothing but the truth relating to said cause; that said evidence was reduced to writing by said deponent in part, and the remainder by
330 me, in my presence and under my direction; that the said plaintiffs and the said defendants were present by their attorneys, H. C. Fox for plaintiff, and Messrs. Stem & Peck for defendants; that said deposition was taken at the office of the agent of the C., H. & I. R. R., at Liberty, Indiana, on the days and dates therein specified, between the hours of 10 a. m. and 4 p. m., and that all continuances, changes, and irregularities in adjournment and taking of said depositions *was* agreed to by said parties.

In witness whereof I have hereunto set my hand and seal this 14th day of March, 1882.

[SEAL.] THOMAS D. EVANS,
Special Examiner & Notary Public.

331 In the Circuit Court of the United States for the District of Indiana. November Term, 1881. In Recess.

JOHN W. WESTCOTT *et al.*
vs.
SQUIRE RUDE *et al.*
} Chancery No. 4314.

MARCH 29, 1882.

Come now the complainants, by Henry O. Fox, solicitor, and, upon motion, it is ordered that George Needham, of the city of Richmond, Indiana, be, and he is hereby, appointed special examiner in chancery in this cause, and is empowered to cause to come before him at his office, in the city of Richmond, county of Wayne, State of Indiana, upon proper notice given to the defendants, the witnesses of the defendants, and to take their depositions in writing and return the same, duly certified, into this court, addressed to the clerk thereof, at Indianapolis.

UNITED STATES OF AMERICA, *District of Indiana:*

I, Noble C. Butler, clerk of the circuit court of the United States within and for said district, do hereby certify that the above and foregoing is a full and true copy of an order this day made and entered in said court.

Witness my hand and the seal of said court at Indian-
332 apolis, in said district, this 29th day of March, 1882.

[SEAL.] NOBLE C. BUTLER, *Clerk.*

Evidence to be Read before the Special Master, Commissioner in Chancery.

Circuit Court of the United States for the District of Indiana. In Equity.

JOHN M. WESTCOTT and CHARLES W. WEST
vs.
SQUIRE B. RUDE, GEORGE W. RUDE, and JOHN R. RUDE.
} No. 4314.

Before the master.

The defendants will take notice that the complainants will examine witnesses in this cause, under the 67th rule in equity, as amended, before George Needham, special examiner, at the law office of Henry C. Fox, in the city of Richmond, in the county of Wayne, in the State of Indiana, on Wednesday, the 5th day of April, 1882, beginning said examination at 10 o'clock a. m. of said day, and continuing from day to day until completed.

WOOD & BOYD,
Solicitors for Compl'ts.

Received copy March 31, 1882.

STEM & PECK,
Sol. for D'f'ts.

333 STATE OF INDIANA, *County of Wayne,* } *ss:*

In the United States Circuit Court, District of Indiana.

To George Rude, Esq.:

You are hereby commanded to personally be and appear before me, the undersigned, a special examiner, duly appointed by the circuit court of the United States, district of Indiana, held at the city of Indianapolis, at my law office, No. 510 Main street, in the city of Richmond, Wayne county, Indiana, on Wednesday, the 5th day of April, 1882, at 10 o'clock a. m., then and there to testify on behalf of the plaintiffs in a certain suit now pending in said court, wherein John M. Westcott *et al.* are plaintiffs and Squire L. Rude *et al.* are defendants; and herein fail you at your peril.

Witness my hand and notarial seal this 1st day of April, 1882.

[SEAL.] GEORGE S. NEEDHAM,
U. S. Special Examiner, U. S. Cir. C't, Dist. Ind.

Endorsed: Served by reading the within subpœna on George B. Rude April 4th, 1882. J. L. Grove, sheriff.

334 Circuit Court United States.

JOHN M. WESTCOTT *et al.*
vs. } Chancery No. 4314.
SQUIRE RUDE *et al.*

Examination and deposition of George W. Rude, a witness produced and sworn before me, George S. Needham, a special examiner in chancery, duly appointed by the United States circuit court, district of Indiana, on the 29th day of March, 1882, to take the deposition- in writing of witnesses in a certain cause now pending in said court and numbered 4314, entitled John M. Westcott *et al. vs.* Squire L. Rude *et al.*, on behalf of the complainants.

This deposition is taken pursuant to the order of the said United States circuit court annexed hereto, and was begun, held, and continued pursuant to the annexed notice, also attached herewith.

The said witness GEORGE W. RUDE, of lawful age, being by me first duly sworn, on his oath deposes as follows:

Examined by HENRY C. FOX, Esq., attorney for complainant:

Ques. 1. State your name, age, occupation, and residence.

Answer. George W. Rude; age, 38; manufacturer; Liberty, Indiana.

Ques. 2. Are you one of the defendants in the above-entitled cause?

335 Ans. Yes, sir.

Ques. 3. You say you are a manufacturer; what are you engaged in manufacturing?

Ans. Cultivators, grain drills, hay rakes, corn drills, and other agricultural implements.

Ques. 4. How long have you been engaged in the manufacture of grain drills?

Ans. About eleven years. It was 1870 when I first commenced—about 12 years.

Ques. 5. Have you been engaged continuously in the manufacture of such drills since the year 1870 up to the present time, and are you still so engaged?

Ans. From the year 1870 up to the year 1876 we were engaged continuously in the manufacture of such drills. In the years '76 & '77 we did not order any irons, but fetched in the drills scattered over the country, and they were painted over and fixed up, and also the other drills scattered around the establishment. We commenced about the 1st of April, 1878, to build drills. About the 7th July they were burnt up. No drills had been gotten out. On the first of September we got out a few, I don't know how many, of the 5-hoed drills and a couple of the 8-hoed drills as samples, the first we ever made of the new kind. From that time on we have been steadily manufacturing drills.

336 Ques. 6. Are you familiar with the claims in the patents number 30685, dated November 20th, 1860, for improvements in seed drills, and No. 31819, dated March 26, 1861, issued to one Hiram Moore by the Patent Office of the United States?

Ans. I am.

Ques. 7. When did you first become familiar with such claims?

Ans. It was about the year 1880. I never paid any attention to them until that time. I knew there was such a patent out, but I did not pay any attention to that branch.

Ques. 8. When did you first learn that such patents were in existence?

Ans. In the spring of 1876, I believe. I would not be positive.

Ques. 9. Did you make out a sworn statement of the number of infringing drills in the above-entitled cause since the injunction was granted by the court hearing said cause; if so, where is it?

(Objected to.) Question objected to as incompetent for the reason that all statements made by the defendants of the character referred to in the question were made for the purpose of and were a part of negotiations for a compromise of this suit and are not a proper subject of examination now.

337 Ans. Well, there was a statement made out. I was called on for it. I believe it was sworn to, but I would not be positive. I don't know where it is.

Ques. 10. Did it state the number of infringing drills correctly?

Ans. I don't know.

Ques. 11. Did you assist in making it out?

All questions referring to such statements objected to for the reasons above given.

Ans. I did, but not a great deal.

Ques. 12. Did you see it and look over it for the purpose of ascertaining the aggregate number of drills stated therein?

Ans. I did.

(Same objection.)

Ques. 13. Did you swear to it? If not, who did?

Ans. I am not positive.

(Same objection.)

Ques. 14. Do you now remember the number of drills stated therein? If so, state the number.

Ans. I don't.

Ques. 15. Give your best impression.

Same objection as above.

Ans. From fifteen to eighteen hundred—some place along there; from fourteen to eighteen hundred.

Ques. 16. Wasn't it as many as two thousand?

Ans. No.

338 Ques. 17. If the drills referred to in that statement were infringing drills, state fully wherein they infringed on the patents described in the complaint in this action.

Ans. I don't know.

Ques. 18. Are you not familiar with the claims of those patents?

Witness desires to correct the answer to question 17, as follows: I don't know whether all of them did or not—part of them did, I know.

Ques. 19. Wherein did any of them infringe?

Ans. Part of them infringed in the oblique discharge and part in the cored-out cylinder. I don't think any of them infringed on the movable shaft.

Ques. 20. If they were not all infringing drills why did you include those which were not infringing in the statement?

Ans. I don't know exactly what that statement was made out for.

Ques. 21. When did you first manufacture infringing drills, as you understand them?

Ans. We put them on the market, I think, first in 1872.

(Question objected to as incompetent.)

Ques. 22. Wherein did those you put on the market in 1872 infringe on the patents in question?

339 (Question objected to as requiring an answer involving an interpretation of a written instrument and requiring expert knowledge, witness not having shown himself qualified to answer the question.)

Ans. I don't believe that I could tell.

Ques. 23. Then how do you know that they infringe?

Ans. I don't know if any of them infringed that year. I wouldn't be positive.

Ques. 24. Then what did you mean by saying that we first put infringing drills on the market in 1872?

Ans. Because that was the first season we put that kind and style of a drill on the market, but I don't know whether they had the features about them which made them infringe.

Ques. 25. What was the style of a drill that you refer to as "that style of drill?"

Ans. It was a five-hoed drill, force feed and woven cog.

(It is here agreed by complainant- and defendants' counsel that exhibit marked Plaintiffs' Exhibit Seed Cup, marked A 1, and Plaintiffs' Exhibit Seed Cup B No. 1, now in evidence, shall be used and referred to in this examination as Exhibits A 1 & B 1.)

Ques. 26. You may state what experience you have had in the manufacture of grain drills and in the examination of patents connected therewith.

340 Ans. I don't know as I have had a great deal. My brother attended to the drill business almost altogether—that is, the patent part—and getting up the feed, except that one I got up, I referred to awhile ago.

Ques. 27. Haven't you been connected with the firm of Rude Bros. since they have been engaged in the manufacture of drills, and been about and taken part in the management of the business, and at all times been familiar with the machines and the different parts thereof that they were engaged in manufacturing?

Ans. Part of the time I have and part of the time haven't. I have been connected with them since they began to manufacture drills, and have taken part in the management of the business. I don't know as I have at all times been familiar with the different machines that they have been manufacturing, as that was not always my part of the business.

Ques. 28. When were any seeding machines manufactured by your company that you were or are not familiar with?

Ans. It would be in 1878 & 1879, 1880 & 1881, because I kept the books then and paid very little attention to the machines. I

341 had all that I could attend to without looking after them.

Ques. 29. Do you say that you do not know the character of the feeding devices used on machines manufactured by your company during those years?

Ans. I don't for positive. I can give the most of it, but would not be positive about all.

Ques. 30. Were you not engaged in the inspection and examination of the feeding devices used upon your machines and others during those years or any part thereof for the purpose of making improvements thereon and for the purpose of obtaining patents upon inventions connected therewith?

Ans. I don't know as I was, only partly, because I did not make any inventions then on the feed, I don't believe.

Ques. 31. Did your firm ever manufacture any grain drills containing a feeding device like exhibit marked A 1?

(Here Exhibit A 1 handed witness.)

Ans. We have.

Ques. 32. When did you first manufacture a drill containing a feeding device like Exhibit A 1?

Ans. I think that there was a few of them manufactured first in 1874.

Ques. 33. Did you manufacture any drills previous to that time that contained a cored feed roll or an oblique discharge orifice in the feeding device?

342 Ans. I think we did.

Ques. 34. When did you first manufacture drills containing either of these features?

Ans. We made four of them in 1870, but I don't know of any of them being put on the market till some time afterward—maybe a couple of years afterward.

Ques. 35. You say you made four in 1870; when did you manufacture the next ones?

Ans. I can't be positive about that till 1873; then the Variety Iron Works changed our patterns.

Ques. 36. What kind of a drill did you manufacture in 1871?

Ans. It was a slide drill.

Ques. 37. Did you manufacture any force-feed drills in 1871 at all?

Ans. I won't be positive about that; I might get the date wrong. If I had thought about it I might have got it correct.

Ques. 38. Did the first drills you manufactured containing a force feed have either a cored feed roll or an oblique discharge orifice?

Ans. I think it did, and am almost positive.

Ques. 39. Did it have only one or contain both?

Ans. It had both—I think it did. It has been so long ago.

Ques. 40. How long did you continue to manufacture your first force-feed drills before your patterns were changed?

343 Ans. He only manufactured four of them.

Ques. 41. What kind of a feeding device did you use upon drills manufactured by you in 1871?

Ans. Part of them, I would not be positive as to all of them, was slide feed.

Ques. 42. What kind were the others?

Ans. I don't know positive as there were any others, but I think the drill we manufactured in 1872 was gotten up in the fall of 1871 and a few made.

Ques. 43. Did the drill that you speak of as being gotten up in the fall of 1871 contain the oblique discharge orifice and cored feed roll?

Ans. I don't know.

Ques. 44. Did you never examine the feeding devices on those machines to see how they were made?

Ans. I think I have; am almost positive about that.

Ques. 45. Then how is it you can't tell whether they contained the features above described?

Ans. I am about positive that the mouth or discharge was made straight, and in making of the hole in the cylinder the pattern was made to core them out, and it was sent to, I think it was the Dayton Machine Company, to get the castings, and they claimed that
344 they couldn't core them out as the pattern was made, and they would have to core them out straight through same size, and I think the pattern was changed before any was made to amount to anything anyway.

Ques. 46. What kind of drills did you make in 1872? Did you make any drills containing the oblique discharge and cored feed roll?

Ans. I answered that was before. I don't think we did. I wouldn't be positive. It was a force feed but a worn cog.

Ques. 47. Who attended to the shipping of your drills in 1872?

Ans. I did partly and my brother Squire did partly.

Ques. 48. Do you remember of shipping any drills to Howke, Spencer & Co., of Indianapolis, in that year?

Ans. I don't know as I do. We remember sending them something because we never got paid for it.

Ques. 49. What kind of drills, as to feeding devices, did you manufacture in 1873?

Ans. They were similar to the ones made in 1872, only we made new patterns of the seed cups. In changing the patterns of the seed cups they filled up the corners of the mouth and made it a little rounder. I don't know whether it was enough to make it oblique or not. I know I kicked against it. They were
345 making from the wood patterns and iron patterns at the same time.

Ques. 50. Did the seed cups, after the patterns were changed, have oblique discharge orifice like that in Exhibit A 1?

Ans. No; it wasn't so much; not nearly.

Ques. 51. Was it upon the same general principle?

Ans. I don't know as it was; it was just the corners filled up to make it pull out of the sand easy.

Ques. 52. What kind of a hole was there through the feed roll, and how was it adjusted on the driving shaft?

Ans. I think that there was a square hole clean through the same size, but I am not positive; it has been so long ago.

Ques. 53. How long did you continue the manufacture of the drills containing the feeding device last above described?

Ans. The patterns were changed the next season; again, 1874, they were taken to the Variety Iron Works and the feed cups and feed cylinders. They made new patterns off of the last patterns of the Dayton Machine Company. They carded them up, and they changed the cylinder pattern for to make it make its own core, and tapered out each way from the centre. The discharge orifice was rounded out a good deal more than it was before.

346 Ques. 54. Was the discharge orifice similar to the one in Exhibit A 1?

Ans. It was; but not so much rounded out.

Ques. 55. Did you make any drills in 1872–'73 containing an oblique discharge orifice or cylinder cored with a bearing upon the shaft shorter than the cylinder?

Ans. I can't be positive about it—whether we did or didn't.

Ques. 56. Did the new seed cups made after the patterns were changed by the Variety Works have a cored cylinder upon the shaft shorter than the cylinder?

Ans. Yes; they had.

Ques. 57. Now fix, as near as you can, the date that you first made machines containing such feed cups and cylinders.

Ans. We commenced about the first of May, 1874.

Ques. 58. How many drills did you make containing this feeding device?

Ans. I couldn't tell that.

Ques. 59. Give us your best impression as to how many you made in 1874.

Ans. From a hundred to one hundred and seventy-five.

Ques. 60. Did all the drills you made that year have such a feeding device?

Ans. They had, I think; I wouldn't be positive.

347 Ques. 61. Were all the drills you manufactured in 1875 5-hoed drills?

Ans. I think they were—won't be positive.

Ques. 62. When did you first commence manufacturing 8-hoed drills?

Ans. In 1874. I was mistaken in my last answer as to all drills being 5-hoed drills manufactured that year. We made a few 8-hoed drills.

Ques. 63. What kind of a seed cup and cylinder did you use on your 8-hoed drill?

Ans. It was similar to the one used on the 5-hoed drill.

Ques. 64. How many 5-hoed drills did you manufacture during the year 1875?

Ans. I have to guess at that—from a hundred to two hundred.

Ques. 65. How many 8-hoed drills did you manufacture during that year?

Ans. I think about a dozen.

Ques. 66. Did they all contain feed cups and cylinders similar to those made in 1874?

Ans. They did.

Ques. 67. How many 5-hoed drills did you make in 1876?

Ans. I did not manufacture any.

Ques. 68. Did you ship or sell any in 1876?

Ans. Yes.

Ques. 69. How many?

Ans. I don't know, but I don't think many.

348 Ques. 70. Did you manufacture, ship, or sell any during 1877?

Ans. We did not directly manufacture any. We gathered in a lot of old ones around the country and in the shops and painted them up and fixed them over and shipped them away.

Ques. 71. Did you manufacture any in 1878?

Ans. Yes.

Ques 72. How many 5-hoed drills did you manufacture in that year?

Ans. I think about a dozen or 15, and they gathered up about 15 or 18 more from around the country, painted them and fixed them up and shipped them off.

Ques. 73. Did they contain the same kind of feed cups and cylinders as the others you have mentioned?

Ans. Not the ones manufactured didn't, but the ones gathered in did. We began making in that year seed cups like Exhibit B No. 1. We made three of them that fall, I think. The 5-hoed drills manufactured that year had feed devices like exhibit marked A 1.

Ques. 74. When did you commence manufacturing feeding devices like exhibit marked A 1?

Ans. In 1875.

Ques. 75. When did your manufacturing establishment burn?

349 Ans. It was July 7th, 1878.

Ques. 76. How soon did you begin manufacturing drills after your manufactury burned?

Ans. In about six weeks.

The further examination of this witness is at this point discontinued on account of the witness living at a distance in the country, and the hour being late, and adjourned until to-morrow morning at ten o'clock—Thursday morning, April 6, 1882.

THURSDAY MORNING, *April 6th*, 1882.

Pursuant to the adjournment as above stated, I, on the 6th day of April, 1882, continued the taking of said deposition. In continuation of his said deposition the deponent further deposes as follows:

Ques. 77. How many 5-hoed drills did you manufacture in the year 1878, after your manufactury burned?

Ans. About a dozen or fifteen.

Ques. 78. How many 5-hoed drills did you manufacture in the year 1879?

Ans. About one hundred.

Ques. 79. How many 8-hoed drills did you manufacture in the year 1879?

Ans. I'll have to guess at that; from 325 to 425, but I wouldn't be positive.

Ques. 80. How many of the drills manufactured during the year 1879 had feeding devices like Exhibit A 1?

350 Ans. I think all of the 5-hoed drills.

Ques. 81. How many of the drills manufactured during the year 1879 had feeding devices like Exhibit B 1?

(Question objected to, Exhibit B 1 never having been before the court and not having been held to be an infringement of the letters patent sued on.)

Ans. All of the 8-hoed drills.

Ques. 82. Did you manufacture or sell any other seeding machines during the year 1879 that contained feeding devices different from the two exhibits above named?

Ans. I think not.

Ques. 83. How many five-hoed drills did you manufacture during the year 1880?

Ans. I'd say from two hundred to three hundred and twenty-five. It is all a guess.

Ques. 84. How many eight-hoed drills did you manufacture during the year 1880?

Ans. I'll have to make a guess at that; from seven hundred to a thousand.

Ques. 85. Did you manufacture any three-hoed drills during the year 1880? If so, how many?

Ans. Yes; that is a guess; I'll say about 25. I think they were all returned at least once.

Ques. 86. How many of the drills manufactured that year had feeding devices like Exhibit A 1?

351 Ans. I ain't positive that there was any of them. We changed the patterns during that year to make the discharge orifice straight instead of round, but the hole through the cylinder remained unchanged.

Ques. 87. Then the feeding devices upon the five-hoed drills manufactured by you during the year 1880 were like Exhibit A 1, with the exception of the change in the discharge orifice of which you have spoken?

(Objected to as leading.)

Ans. Yes.

Ques. 88. You say you changed the discharge orifice by making it straight in the year 1880? Give your best impression as to the exact time during the year when the change was made.

Ans. I think it was some time in July—maybe the first of August.

Ques. 89. Did you make any other change in the feeding device of the 5-hoed drills in that year, except that above mentioned?

Ans. Not as I know of; none made that I know of.

Ques. 90. I wish you would describe particularly the change which you made in the discharge orifice?

Ans. I have answered that I guess we just cut it straight across the bottom.

352 Ques. 91. How many of the drills manufactured in that year had feeding devices like Exhibit B 1?

(Question objected to, as Exhibit B 1 has never been held by the court to be an infringement of the letters patent sued on.)

Ans. All of the 8 hoed, I think.

Ques. 92. What kind of feeding devices did you place in the 3-hoed drills?

Ans. The same as was on the 5-hoed drills.

Ques. 93. Did the feeding devices on the 3-hoed drills have round or oblique discharge orifices?

Ans. I think not. They had both. There were some of each kind. There were some of each kind in the same drill.

Ques. 94. Who made your castings for your feeding devices in the year 1880?

Ans. I think they were made at Hamilton by Sohn & Reutesler.

Ques. 95. Who made your castings for your feeding devices during the years 1878 & 1879?

Ans. The same parties.

Ques. 96. How many set of feeding-device castings did you have made in 1880?

Ans. We had a good many more than was put up. I'd say
353 from a thousand to twelve hundred—that is, enough for
a thousand to twelve hundred drills & enough for from two to three hundred 5-hoed drills. These feeding devices were not all furnished complete—a good many of them were hauled back and made over, and there are several bbls. of them now in the shop.

Ques. 97. From what point did you ship your drills during the year 1880, and how?

Ans. From Liberty, Indiana, by railroad.

Ques. 98. Through the office of what railroad did you ship, and who was the agent that received the goods?

Ans. C., H. & I. railroad office. The agent's name was H. C. Ham.

Ques. 99. How many 5-hoed drills did you make prior to 23rd day of May, A. D. 1881?

Ans. I suppose a hundred; that is guess-work.

Ques. 100. How many 8-hoed drills did you make during the time embraced in the last question?

Ans. I suppose about two hundred.

Ques. 101. Did these 5-hoed drills have feeding devices like those on the drills manufactured by you during the year 1880?

Ans. They had not; no.

Ques. 102. Wherein did they differ?

354 Ans. In the hole in the cylinder. It was a square hole, to fit the shaft, cored the same size clear through. I'm not certain that they were all that way. I might have worked in some of the irons like those in 1880.

Ques. 103. How many of the 8-hoed drills manufactured in 1880 had feeding devices like Exhibit B No. 1?

Ans. That would be a guess. I'll say from 40 to 75.

Ques. 104. Did you have any drills on hand on the 23rd day of May, 1881, containing feeding devices like Exhibit B No. 1?

Ans. We had; yes.

Ques. 105. Did you ship any drills after that date containing such feeding devices?

Ans. We didn't that I know of; I'm almost positive.

Ques. 106. Did you not ship a car-load of drills containing such feeding devices to C. H. Geddings, Danville, Illinois, after the 23rd day of May, 1881?

Ans. Not as I know of.

Ques. 107. Did the drills manufactured by you in 1881, of which you have spoken, have a feed cylinder, with separate bearings in the case and a single shaft bearing in the cylinder?

355 Ans. My views of it is that I don't think they did.

Ques. 108. Has not Exhibit B No. 1 a single shaft bearing in the cylinder?

Ans. I don't think it has. It is my view on it that the bearing is in the hub.

Ques. 109. Does it have a feed cylinder with separate bearings in the case?

(Objected to as incompetent, calling for expert knowledge.)

Ans. My view of it is that one bearing is in the case and the other one is in the rosette.

Ques. 110. Has it an oblique discharge orifice?

(Objected to as incompetent, calling for expert knowledge.)

Ans. I think it has.

Ques. 111. Do you pretend to possess a sufficient knowledge, as an expert of the science of mechanics, to be able to tell whether Exhibit B No. 1 has a feed cylinder with separate bearings in the case and a single shaft bearing in the cylinder?

Ans. No; I don't think I do.

Ques. 112. Have you sufficient knowledge as an expert to tell when a grain drill has in its feeding mechanism a passage arranged between the bottom of the hopper and the feed roll in connection with an oblique discharge?

356 Ans. No; I don't think I have.

Ques. 113. Did you sell any drills in 1880 that were sent out without being shipped through the railroad office of which you have spoken?

Ans. Yes.

Ques. 114. How many, to the best of your knowledge?

Ans. About half a dozen, sold in the neighborhood.

Ques. 115. How was it in 1878 & 1879?

Ans. I don't think there were any. There might have been 3 or 4.

Ques. 116. How many did you thus sell in 1874, 1875, & 1876?

Ans. I can't recollect of any. I have an idea that there were some. I think a half dozen, probably.

Ques. 117. Since you have had your factory burned, has your firm kept any books in which entries were made showing the number of drills manufactured or shipped?

Ans. They haven't any but an invoice letter book containing a copy of the invoices taken, and that don't contain all of them.

Ques. 118. Don't you keep an account on your books of the number of drills which you ship and to whom you ship them?

Ans. Only on the letter book above described.

357 Ques. 119. How many different places have you had castings made since you have been in the business, and by whom?

Ans. I believe the Dayton Machine Company, Variety Iron Works, and Sohn & Reutester—the last two at Hamilton, Ohio.

Ques. 120. When did you send out the last machines which had feeding devices on like Exhibit B No. 1?

Ans. I don't know.

Ques. 121. State your best impression.

Ans. There might have some gone out on up to the time of the injunction. There were a lot in there I know.

Ques. 122. Were the shipments of drills, stated in the deposition of H. C. Ham as being made through the C., H. & I. railroad office, Liberty, Indiana, made by your firm?

Ans. Yes.

Cross-examination:

Ques. 123. Did your firm manufacture any 8-hoed drills prior to 1875?

Ans. I think not.

Ques. 124. By whom were the 8-hoed drills reported by Mr. Ham to have been shipped by you prior to 1875 manufactured?

358 Ans. I think a part of them were Buckeye drills and a Gump drill made by the Dayton Machine Company, and I believe that there was a couple of them were McSherry drills, of Dayton, Ohio; Hoosier drill, of Milton, Indiana. That is all.

Ques. 125. When did you stop manufacturing drills like Exhibit B 1?

Ans. I believe about the first of October, 1880.

Ques. 126. Did you have any of these drills on hand the following year?

Ans. Yes.

Ques. 127. What was done with them?

Ans. A part of them was sold, and part of them the feeding device was taken off and barrelled up and a different device put on them, and a part of them is still in the shop yet.

Ques. 128. You say, in answer to question 49, that for the drills made in 1873 the patterns were a little rounded up at the discharge orifice; by whose orders was this done?

(Objected to as immaterial.)

Ans. They didn't have any orders at all, as I know of. I'm positive almost that they didn't have any orders.

Ques. 129. Why was it done and by whom?

(Objected to as immaterial.)

Ans. I suppose the reason it was done was to make it so 359 that a poorer class of molders could mold the cups and make them perfect—the parties that made the patterns. I suppose the Dayton Machine Company did it. I never knew exactly who did it.

Ques. 130. Did it work as well on the drill as with the old straight discharge orifice?

(Objected to as being immaterial.)

Ans. I don't know as it made any difference, but the cog on that feed I thought called for a straight mouth.

Ques. 131. What kind of a cog was it?

Ans. It was a woven or zigzag cog.

Ques. 132. State whether, so far as you observed the machine, it operated better with the zigzag cog and straight discharge orifice or oblique discharge orifice.

(Objected to as being immaterial and not being proper cross-examination, not being responsive to the examination-in-chief.)

Ans. I could never see any difference.

Ques. 133. In answer to question 53 you say that in 1874 the patterns were taken to the Variety Iron Works and they made new patterns and made the hole of the cylinder taper out each way from the center and rounded up the discharge orifice a little more. 360 Was this change made by your orders and why was it made?

(Objected to as being immaterial.)

Ans. No, it was not made by our orders; in casting the cylinders to make their own core of green sand and to save them from making a dry sand core.

Ques. 134. Who got up the patterns for Exhibit A 1?

(Objected to as being immaterial.)

Ans. John R. Rude, I believe.

Ques. 135. What do you mean when you say, in answer to question 70, we gathered in the old drills around the country and fixed them up and sent them out again?

Ans. We did a commission business then and had drills at different points to be sold on commission which were not sold and no prospect of being sold, and we called them back home and fixed them up and painted them and sent them out again.

Ques. 136. When was this suit begun against you, as near as you can recollect?

(Objected to as not being the best evidence.)

Ans. In the spring of 1876.

GEO. W. RUDE.

361 STATE OF INDIANA, County of Wayne, } ss:

I, George S. Needham, a special examiner in chancery, in this cause duly appointed, do hereby certify that the deponent, George W. Rude, whose place of residence is Liberty, Indiana, was first duly sworn by me to testify the whole truth of his knowledge touching the matter in controversy; that I propounded the interrogatories and wrote and inserted the answers thereto, respectively; that the separate answers were carefully read over to said deponent, and all interlineations and corrections were made before the signing thereof; that the examination was reduced to writing by me, and I am neither a party, an agent, or attorney for either party to said suit, nor am I in anywise interested in the event of said suit. The said deposition was sworn to and subscribed in my presence by the said deponent, at Richmond, Wayne county, Indiana, on the 6th day of April, 1882. The said deposition was taken at the place and for the purpose named in the caption thereof; that the complainants appeared by Henry C. Fox, Esq., their attorney, and the defendants by 362 —— ——, their attorney; and also appeared one of the defendants in person, being the deponent herein; that said deposition was begun on the 5th day of April, 1882, between the hours of 10 a. m. and 6 p. m., and continued one day by adjournment—one day as set forth in the foregoing deposition.

In witness whereof I have hereunto set my hand and notarial seal this 6th day of April, 1882.

[SEAL.] GEO. S. NEEDHAM,
Notary Public & Special Examiner.

363 Circuit Court of the United States, District of Indiana.

JOHN M. WESTCOTT *et al.*, Complainants,
vs.
SQUIRE B. RUDE *et al.*, Defendants.

Deposition of P. P. Mast, of Springfield, Ohio, a witness produced and sworn before me, a notary public, at said city of Springfield, in Clarke county, State of Ohio, on the third day of July, 1883, taken on behalf of the defendants in the above-entitled action.

This deposition is taken by agreement of said parties (notice thereof being waived before me) and is to be read in evidence on the hearing of the reference of said cause before Hon. William P. Fishback, master in chancery of the said circuit court of the United States for the district of Indiana.

Present at the taking of said deposition: Arthur Stem, Esq., of def'ts' counsel, and Henry C. Fox, Esq., of counsel for complainants.

The said P. P. MASTER, being duly sworn to testify the truth, the whole truth, and nothing but the truth relating to said cause, deposes as follows:

Question 1. State your name, age, residence, and occupation.

Answer. P. P. Mast; age, 58 years; residence, Springfield, Ohio; and occupation, manufacturer of agricultural implements.

364 Q. 2. State whether or not John M. Westcott ever claimed that you or your firm were infringing letters patent No. —, granted Hiram Moore; and, if so, whether you ever had any settlement with him.

Objection.—(Objected to by complainants' counsel as leading and irrelevant.)

Ans. He did claim that we infringed and I made settlement with him.

Q. 3. Please state when that settlement was made as near as you can under the circumstances.

Obj.—(Objected to for the reason that it is irrelevant to the issues in the cause.)

Ans. I do not recollect the exact year, but think it was in 1876; it may have been earlier or later. He claimed that we infringed his patent and was threatening suit. We claim- that he infringed some of our patents; but he claimed that we were using his longer than he was using ours; so we effected a settlement, paying part money, balance in exchange of privileges of use.

Q. 4. About how much money was paid in settlement?

Ans. I can't tell exactly; it was paid at different times. I think between two and three thousand dollars.

Q. 5. Was or was not the gross amount of this money settlement arranged at the time of the exchange of privileges?

Obj.—(Objected to for reasons above stated.)

Ans. It was not definitely settled, as it depended on circumstances somewhat.

365 Q. 6. Did or did it not represent the additional time that Westcott claimed that you had been using the Moore patents over the time that you claimed he had been using your patents?

Obj.—(Objected to as leading, irrelevant, and not as of contradiction of any testimony given by complainants.)

Ans. He claimed that he ought to have some difference, and that was one of the reasons, but we made no estimate as to the definite time or number of machines that were made under one patent more than the other.

It was a settlement of the whole matter without regard to the definite time either had been using the other's patent, and no estimate was made of the number of machines.

P. P. MAST.

STATE OF OHIO, } ss:
County of Clarke, }

I, Frank C. Goode, a notary public within and for the said county, hereby certify that the above P. P. Mast was by me first duly sworn, according to law, to testify the truth, the whole truth, and nothing but the truth relating to said cause; that his deposition was reduced to writing by me in presence of said witness and was subscribed by said witness in my presence; that the complainants, John M. Westcott and others, attended the taking of said deposition, by Henry C. Fox, their counsel; that the said deposition was taken by agreement of the counsel for the respective parties, and notice thereof was waived by complainants, and that said deposition was taken
366 at the office of P. P. Mast & Co., in the city of Springfield, county of Clarke, State of Ohio, between the hours of ten o'clock a. m. and 12 o'clock noon of Tuesday, July 3d, 1883.

In testimony whereof I have hereunto set my hand and notarial seal this 3rd day of July, 1883.

[SEAL.] FRANK C. GOODE,
Notary Public, Clarke Co., Ohio.

367 Circuit Court of the United States for the District of Indiana. In Equity.

JOHN M. WESTCOTT *et al. vs.* SQUIRE B. RUDE *et al.*

The complainants will take notice that the defendants will examine witnesses in the above-named cause, under the 67th rule in equity, as amended, before Thomas D. Evans, notary public and acting special examiner, at Liberty, Indiana, at the office of said Evans, on Friday, the 29th day of June, 1883, beginning said examination at 10 o'clock a. m. of said day and continuing from day to day until completed.

STEM AND PECK,
Solicitors for Def'ts.
HENRY C. FOX,
Solicitor for Compl'ts.

United States Circuit Court, District of Indiana. In Equity.

JOHN M. WESTCOTT *et al.* }
vs. } 4314.
SQUIRE B. RUDE *et al.* }

Depositions taken on the account before the master, Wm. P. Fishback.

368 Testimony taken before me in accordance with the foregoing notice—Thomas D. Evans, a notary public and acting special examiner—by consent of parties.

The witness, SQUIRE B. RUDE, being produced by defendants and being first duly sworn, deposes and says, in answer to interrogatories propounded by ARTHUR STEM, att'y for defendants, and H. C. FOX, att'y for complainant-, both being present throughout the examination:

Q. 1. State your name, residence, and occupation.
Squire B. Rude; Liberty, Ind.; occupation, manufacturer.
Q. 2. Are you the same S. B. Rude who formerly testified in this cause and one of the defendants?
I am.
Q. 3. Please state whether any change was made in the construction of the grain drills made by the defendants in 1880 or 1881; if so, what.

Objected to by plantiffs' counsel because this witness has once been examined in regard thereto.

Answer. We have—yes; one change was the cutting of the mouth of the feed cup square instead of oblique. Another change was the making of the square hole through the cylinder of the same size for its entire length. This change was made before the other change.
Question. Can you produce a feed cup and roll showing these two changes?
Answer. I can and will.
Question. State whether or not after this change was made there was any difference in the operation or working qualities of the drill.

369 (Objected to by plaintiff- because immaterial and unimportant and not in answer to any examination made by the complainants.)

Ans. No perceivable difference.
Ques. 6. Did your customers make any complaint of the change?

(Objected to because immaterial, unimportant; that complainants by the customers could make no difference as to the liability of the defendants under the decree, and because of hearsay.)

Ans. None.
Ques. 7. Did any of them express any preference for either construction; if so, for which?

(Objected to because irrelevant and unimportant and calling for conclusions and upon a matter which the complainants have not the power to contradict, and because asking for hearsay testimony.)

Ans. They did, & the latter after the change was made.

(Answer objected to because if permitted to answer the question he should state what was said by their customers and who said it, and because for hearsay testimony.)

Question. Can you name any customer who expressed this preference for the altered machine and state in substance what was said?

(Objected to as irrelevant and *for* the statements of a customer could in nowise effect the liability of the defendants under the decree.)

370 Answer. H. Reinstedlee, of St. Louis, Mo., preferred the latter for the following reason: The latter, having bearings at either end of the cylinder, prevented the same, by the pressure of the grain, from raising and falling from a direct line with the feed shaft, and that the cutting of the mouth or outlet of the feed cup square prevented the grain from building up, as in the old or oblique form of outlet; that in stopping the machine while at work there was an accumulation of grain at the mouth of the oblique cup that prevented sudden stoppage or flow of grain, as in the latter.

(Answer objected to because not in answer to the question asked and because it is mere hearsay.)

Question. Mr. H. C. Hane has testified in this case as to the number of drills shipped by the defendants by the railroad from Liberty prior to July, 1881. State whether or not any of those drills were returned to the defendants without being sold; and, if so, how many.

(Objected to because irrelevant and unimportant as to whether any of said drills were sold or not.)

Answer. There have been some returned; it would be impossible to get at the exact number, but I would suppose somewhere near one-fifth.

Question. Have you any means of ascertaining the exact number of drills returned?

Ans. We have not.

Question. Can you now produce the seed cup showing the changes referred to in answer No. 3?

Answer. I can, and here produce it.

(The same is offered in evidence and marked "defendants' 371 improved seeding device.")

Question. State as nearly as you can when the changes referred to were made.

Answer. I think in 1880, in April, is my recollection.

Question. Did the grain drill cost any more to manufacture after these changes were made than before?

(Objected to as being wholly irrelevant and unimportant.)

Answer. I think not.

Question. Are you or are you not confident that there were as many as one-fifth of the drills shipped by the defendants between 1870 and 1881, returned?

(Objected to as leading, unimportant and irrelevant, and not the proper mode of proving the fact sought to be proved.)

Answer. I am not confident as to the number, but knew we had a great many machines returned from different causes; repainted, refitted, and again shipped out.

(Objected as being broader than the question.)

Cross-examined by Mr. Fox, counsel for complainants:

Question 1. Who is H. Reinstedler, of St. Louis, Mo., of whom you have spoken?

Ans. He is an implement dealer to whom we have sold goods for the last five or six years.

Question 2. Does he live in the city of St. Louis, Mo., and is he the man whose deposition has been taken and is now on file in this case?

Ans. I believe he resides in the city of St. Louis and know 372 his place of business to be in the city of St. Louis. I know nothing about his deposition.

Question 3. Did you not send your attorneys to St. Louis to attend the taking of his deposition upon a notice served upon you by the complainants in this case, and did not your said attorneys inform you such a d*is*position had been taken?

Answer. I have no recollection of it until a short time ago; my brother attended to that part of the business; I have no doubt but what he is the same man.

Question 4. Was not Mr. Reinstedler your agent for the State of Missouri and a part of the State of Illinois in the management and sale of your drills at the time he made the statement to you as you have answered in question eight of this deposition?

Answer. He was.

Question 5. Do you know whether Mr. Reinstedler ever made any practicable test with your drills or not?

Answer. I do not.

Question 6. When did you have the conversation with Mr. Reinstedler in which he told you the things that you have mentioned in your answer to question No. 8?

Answer. It will be two years this fall, during the fair at St. Louis.

Question 7. Was that after the decree was entered in this case?

Answer. It was after the decree was rendered.

Question 8. Did you change your feeding device before or after the decree was rendered?

Answer. Before.

Question 9. Did you send out any machines having a feed device having an oblique discharge orifice after the 17th day of May, 1881?

373 Answer. None that I know of during the following year.

Question 10. Did not Rude Bros. ship a car-load of drills with such a feed device to C. H. Giddings, Danville, Illinois, after the 17th day of May, 1881?

Answer. We did not.

Question 11. Did you ship a car-load of such drills to him about that time, either before or after?

Answer. We shipped a car-load May 3d, 1881.

Question 12. Have you any means of knowing what drills were shipped by the Rude Bros. in 1880 and 1881, except by reference to your firm books?

Answer. None that I know of.

Question 13. Have you any means of knowing or telling what drills were returned to your firm in the years 1880 and 1881; if so, what?

Ans. We have our books, I believe, of those two years only.

Question 14. Have you looked and examined your books or do you make the statement you have made above in regard to the number of drills returned from recollection?

Answer. From recollection mainly.

Question 15. Do you pretend to state the number returned with certainty?

Answer. I do not.

Question 16. Were the number returned afterwards sent into the markets of the country?

Answer. They were, with the exception of a few in the buildings when burned.

Question 17. Are you certain as to the date that you made the changes in your feeding devices, as you have above stated?

374 Answer. I know the changes were made prior to the decree of May 17th, 1881.

Question 18. How long before, do you think? Give your best recollection.

Answer. I think the change was made as far back as the last of March or 1st of April of that year—1881.

Question 19. Were the changes of which you have spoken all made about the same time?

Answer. The changes that were made on the exhibits above referred to as defendant's improved seeding device were made about the same time, but the feed cylinder on the 5-hoe drill was changed some time before.

S. B. RUDE.

THE STATE OF INDIANA, } *ss:*
County of Union, }

I, Thomas D. Evans, a notary public within and for said county, hereby certify that the above S. B. Rude was by me first duly sworn according to law to testify the truth, the whole truth, and nothing but the truth relating to said cause; that his deposition was reduced to writing by me; that the complainants were present by their attorney, Mr. H. C. Fox, and the defendants were present by Mr. Stem, attorney for them, and said deposition was taken at the office of Thomas D. Evans in Liberty, Indiana, Union county, on the 29th day of June, 1883, beginning at 10 o'clock a. m. and closing at 3 o'clock p. m., pursuant to the annexed notice.

In testimony whereof I have hereunto set my hand and notarial seal this the 30th day of June, 1883.

[SEAL.] THOMAS D. EVANS,
Notary Public.

Notary's fees paid by defendants, $7.50.

375 In the United States Circuit Court for the District of Indiana.

JOHN M. WESTCOTT *et al. vs.* SQUIRE RUDE *et al.*

Testimony taken in the above-entitled cause before W. P. Fishback, master in chancery, at the law office of Messrs. Dye and Fishback, in the city of Indianapolis, county of Marion, State of Indiana, on Saturday, the 10th day of November, 1883, the same to be read in evidence on the part and in behalf of the defendants herein.

Arthur Stem, Esq., appearing for defendants, Judge Fox appearing for complainants.

JOSEPH K. ENGLISH, for defendants, being first duly sworn, deposes and saith:

Direct interrogatories by Mr. STEM:

Int. 1. State your name, age, occupation, and place of residence.

A. Joseph K. English; 59; painter; Indianapolis, Ind.

Int. 2. State whether or not you were ever a member of the firm of English and Over.

A. I was.

Int. 3. What was their business?

A. A general foundry and machine business, with some manufacturing of farm implements.

Int. 4. Did that firm ever manufacture any grain drills?

376 A. We manufactured a one-horse grain drill to a limited extent.

Int. 5. Was there ever any claim made against that firm by John M. Westcott *et al.* — the drills manufactured by you infringed the patents granted Hiram Moore?

A. There was such a demand made.

Int. 6. Did the firm ever make any settlement with Westcott under such claim?

A. It did.

Int. 7. How much did they pay him in settlement?

A. From my best recollection and the books in the case we paid him at two different times; the sum of $35 in all.

Int. 8. How many drills were made by the firm of English and Over?

A. I am not able to tell very accurately, but judge somewhere between 60 and 75.

Int. 9. How many had been made and sold at the date of the last payment to Westcott?

A. I cannot tell exactly how many had been sold. I know of the sale and payment of 49 drills, while there were quite a number that had been sent out as sample drills, with the privilege of the parties returning them, provided they were not sold, which we had had no report from.

Int. 10. Did Mr. Westcott make any representations to you to induce you to settle with him for his claim of infringement of the Moore patents? If so, state what he said.

Objected to as immaterial and irrelevant.

A. Westcott came to the office and brought some evidence—
377 I don't recollect distinctly what it was; some written agreement—which went to satisfy me that P. P. Mast, of the Buckeye Drill Co., of Springfield, Ohio, had agreed to pay Westcott for what he claimed was an infringement upon the Moore patent, and that in connection with the fact that the Hoosier Drill Co. were using a patent of English and Over's on a one-horse drill, for which they were paying as a royalty; and being on amiable terms with the Hoosier Drill Co. I felt I had better settle with him than to incur the risk of a lawsuit. Mr. Westcott was secretary or treasurer of the Hoosier Drill Co. at that time.

Int. 11. When did you cease to be a member of the firm of English and Over?

A. I think it was in the month of August, 1876.

Int. 12. Did the firm of English and Over take any license from Westcott?

A. I don't remember whether there was any license or not.

Int. 13. Did Over succeed the firm of English and Over?

A. He did.

Int. 14. Did he continue to pay Westcott anything for drills manufactured claimed to infringe the Moore patents after you left the firm?

A. Of course I cannot know anything about that except that he has told me he did not.

Complainants' counsel objects to the latter part of the answer as hearsay and moves to exclude it.

Int. 15. Did Westcott threaten to bring suit on these patents unless settlement was made?

378 A. Well, he did; but no suit was brought. I might add, he may not have threatened to bring suit against us immediately, but he represented that nearly all the drill companies were infringing that patent, and that he intended to bring suit against all who refused to pay royalty.

Int. 16. Including you, of course?

A. Of course, including us; we inferred that.

Cross-interrogatories by Judge Fox:

Int. 1. These drills were one-horse drills, were they not?

A. Yes, sir.

Int. 2. How much does he claim off of you per drill?

A. That I don't remember.

Int. 3. Do you remember whether he stated to you the amount that they were issuing license for the manufacture of one-horse drills?

A. I cannot recollect that he did; while I have no doubt but possibly he did, my recollection would not warrant me in saying he fixed any amount.

Int. 4. Did he propose to license your firm to manufacture under the Moore patents?

A. He proposed to permit us to manufacture.

Int. 5. Upon what terms?

A. I don't remember the terms.

Int. 6. Did he propose to permit you to manufacture upon the payment of a royalty?

A. He did.

Int. 7. But you don't remember the amount?

A. I don't remember the amount.

379 Int. 8. You say he proposed to bring a suit for infringement against those who were infringing the patents?

A. Yes, sir.

Int. 9. This amount of $35 that was paid, was that paid upon your part because he claimed you had infringed the patents and was threatening to bring suit?

A. Yes, sir.

Int. 10. And you say you paid it rather than enter into litigation in regard to the infringement?

A. Yes, sir.

Int. 11. Do you remember whether you paid the full amount he claimed or whether the amount paid was in compromise of the amount he claimed?

A. I don't remember that.

And further the witness saith not.

Ewald Over, called for defendants, being first duly sworn, deposes and saith:

Direct interrogatories by Mr. Stem:

Int. 1. State whether you were at any time a member of the firm of English and Over, of Indianapolis.

A. I was.

Int. 2. Did that firm, as far as you know, take a license from West and Westcott or either of them to manufacture grain drills under the Hiram Moore patent sued on in this case?

A. Not that I know of. I was not an active partner in the concern, and gave it no personal attention.

380 Int. 3. When was the firm of English and Over dissolved?

A. I think in the summer of 1876.

Int. 4. Did you buy out the firm assets and succeed to their business?

A. I did.

Int. 5. Have you continued to manufacture these same grain drills since?

A. I manufacture the drills we made before; I don't know whether they have any reference to this patent concern or not.

Int. 6. Did you ever pay Westcott or any one else any license fee or royalties for the manufacture of those drills under the Hiram Moore patent?

A. No.

And further the witness saith not.

381 The license to Wayne Ag'l Co., referred to in Westcott's deposition, is taken off the file by leave of court, but is in form like that to Mast & Co., annexed to Mr. Westcott's deposition, filed Jan'y 19th, 1885.

M'ch 20th, '85.

WOOD AND BOYD.

United States Circuit Court, District of Indiana.

WESTCOTT *v.* RUDE.

The defendants will take notice that the accounting before the master has been postponed until Tuesday, March 13th, at same place and time.

Yours, &c.,

H. C. FOX,
By WOOD AND BOYD,
Sol'rs for Complainants.

Rec'd copy March 5th, 1883.

STEM AND PECK,
Sol'rs for Def'ts.

Circuit Court of the United States for the District of Indiana. In Equity.

JOHN M. WESTCOTT *et al.*
vs. } 4314.
SQUIRE B. RUDE *et al.*

382 The defendants will take notice that the complainants will examine witnesses in this cause, under an order of the master herein, before said master, at his office, No. 26 Vance block, Indianapolis, in the county of Marion, in the State of Indiana, on Friday, the 9th day of March, 1883, beginning said examination at 9 o'clock a. m. of said day and continuing from day to day until completed.

H. C. FOX,
By WOOD AND BOYD,
Solicitors for Complainants.

Received copy March 1st, 1883.

STEM AND PECK,
Solicitors for Def'ts.

Hearing Before W. P. Fishback, Master, March 13*th*, 1883.

MARCH 13TH, 1883.

Present: Mr. Boyd and Mr. Fox for complainants and Mr. C. M. Peck for defendant-.

JOHN M. WESTCOTT, one of the plaintiffs, being duly sworn, deposes and says:

Examined by **Edward Boyd**, for complainants:

After I became interested in the patents sued on we (John M. Westcott, C. W. West, Hiram Moore) established a license fee of two dollars for two-horse grain drills and one dollar each for one-horse grain drills for the use of the patents or inventions set forth in the bill of complaint, with a proviso in the license that if the license fees were paid promptly when due we would allow a discount 383 of fifty per cent. These licenses were in writing, and I now produce a specimen license, which I make part of this deposition, and mark it Exhibit "Westcott No. 1."

The licensees to whom these licenses were given paid the fees as stipulated. The Wayne Agricultural Co. of Richmond, Indiana, paid for four years, since which time they have paid nothing, their excuse being that they claimed to have bought an interest in the patent. We sued them in this court, and the court decreed that they had no title in the patent, and then they agreed to arbitrate with us and the suit was dismissed. English and Over continued to pay as long as they were in partnership. P. P. Mast & Co., of Springfield, O., changed their feeding device to a different style so they did not infringe our patents and settled with us for a portion of the license fees which they were individually liable for at the date of settlement.

Cross-examined by C. M. **Peck**, for defendants:

No other persons or corporations than those above named took licenses from us under the patents sued on. P. P. Mast had a written license, being like the one produced as above. In the first place, I did not know how many machines P. P. Mast & Co. had made—they had only been organized as a company a short time—at the time of the settlement. Before that the firm was Thomas and Mast, and Mr. Mast paid me a gross amount for his individual liability 384 for using the inventions, leaving Thomas' share unsettled, and from what knowledge I had of the number of machines I supposed they manufactured and the money and other considerations I received from P. P. Mast and P. P. Mast & Co. I think it would amount to as much as the license fees named in the license. The license was to P. P. Mast & Co. Thomas and Mast were out of business. Thomas & Mast had no license, but infringed the patents. The gross amount paid us by P. P. Mast for himself and P. P. Mast & Co. in settlement was $2,500 in cash, and there were other considerations amounting to more than that in value. The gross amount paid by English and Over I cannot state; they settled with me as the basis of the license for all they manufactured. The Wayne Agricultural Co. settled with us on the same basis. I do not recollect the amount.

JOHN M. WESTCOTT.

385 Circuit Court of the United States for the District of Indiana.
In Equity.

JOHN M. WESTCOTT *et al.*
vs. } 4314.
SQUIRE B. RUDE *et al.*

Pending before Honorable Wm. P. Fishback, master.

The complainants will take notice that the defendants will examine witnesses in the above-named cause, under the 67th rule in equity, as amended, before competent authority, examiner, at the office of Wm. W. Snyder, att'y-at-law, Liberty, Indiana, on Friday, the sixth day of February, 1885, beginning said examination at 11 o'clock a. m. of said day and continuing from day to day until completed.

STEM AND PECK,
Solicitors for Def'ts.

Received copy February 4th, 1885.

WOOD AND BOYD,
Solicitors for Compl'ts.

United States Circuit Court, District of Indiana.

JOHN M. WESTCOTT *et al.*
vs. } Chancery. 4314.
SQUIRE B. RUDE *et al.*

Pending before Hon. W. P. Fishback, master.

386 The testimony of Horace G. Swope, a witness produced on behalf of defendants and duly sworn by me, — testified as follows, in answer to interrogatories propounded by counsel.

Present: Mr. Edward Boyd, attorney for compl'ts, and Arthur Stem, counsel for defendants.

UNITED STATES OF AMERICA,
District of Indiana, State of Indiana, County of Union:

I, Thomas D. Evans, acting as special commissioner by consent, certify that on the 6th day of February, 1885, I was attended by H. G. Swope, witness, who *being* of sound mind and lawful age, and said witness — by me *being* first carefully examined and cautioned and sworn to testify the whole truth, and the deposition of said witness — by me reduced to writing in the presence of the witness and from his statement, and, after carefully reading the same to the witness, was subscribed by said witness in my presence. I have retained the said deposition in my possession for the purpose of *certificate* the same with my own hand to the court for which the same was taken; and I do further certify that I am not of counsel or attorney for either of the parties in the said deposition and caption named nor in any way interested in the event of the cause named.

Question 1. State your name, age, residence, and occupation.

387 Answer 1st. Name, A. G. Swope; age, 36; residence, Liberty, Indiana; superintendent of Rude Bros. Manufacturing Company of Liberty, Indiana.

Question 2d. When did you go into the employ of Rude Bros., and when was the company changed to a corporation?

Answer 2d. I went into employ of Rude Bros. in April, 1881. The firm was changed to a corporation in October, 1881.

Question 3d. State whether the Rude Bros. altered the seeding device of their grain drill at any time. If so, when and what alterations was made?

Answer 3d. The Rude Bros. altered their seeding device in May, 1881. They changed the oblique mouth to a straight mouth.

Question 4th. Since that change have there ever been any complaint from the customers of the company about the manner in which the drill fed the grain? Has it ever been charged that the grain was bunched?

Objected to by Mr. Boyd because irrelevant and immaterial.

Answer 4th. Not to my knowledge.

Question 5th. Would you have been likely to have known of such complaints had they have been made?

Answer 5th. Yes, sir.

Question 6th. Has there been any change or reduction in the price of the Rude Bros. drill since the change?

Answer 6th. No, sir.

Question 7th. How does the Rude Bros. drill sell since this change as compared with the Hoosier drill and the Wayne Co. drill?

388 Objected repeated by Mr. Boyd.

Answer 7th. Sell about the same. I know of no difference.

Question 8th. Have the sales of the Rude Bros. drill increased or diminished since the change in 1881 from the oblique to the straight discharge?

Answer 8th. The sale has increased.

Counsel for defendant offers in evidence letters patent of the United States No. 7163, granted Flory and Grove March 12th, 1850, and marks the same Exhibit Flory and Grove; also letters patent 18579, granted A. Franklin November 10th, 1857, and marks the same Franklin Patent.

Counsel for the complainants object to the introduction of both exhibits as irrelevant and incompetent.

Question 9th. As a matter of fact, does the Rude Bros. grain drill distribute the feed as evenly and as free from bunching with the streight discharge as with the oblique?

Answer 9th. It does.

Cross-examined by Mr. Boyd:

X Question 10th. Were any changes other than you have named made in 1881 or since?

X Answer 10th. Yes; there was a change made in 1883.

X Question 11th. How is the delivery mouth constructed on the drills as now made by your company?

Answer 11th. It is an oblique mouth.

X Question 12th. Had the drills made with the streight discharge a channel in rear of and under the distributing cylinder?

Answer. Yes, sir.

389 X Question 13th. Was the streight mouth also elevated so as to make it a force feed?

Ans. Yes, sir.

X Question 14th. Why did you return to the oblique discharge, and when?

Answer. I do not know when. I was ordered by John Rude (now deceased) to make that change in 1883.

Re-examined by Mr. STEM:

Question 15th. Do you know of any advantage of the oblique mouth over the straight mouth, either in the feeding of the machine or in casting the feed cups, that induced John Rude to change back to the oblique?

Objected to because not proper re-examination.

Answer. I don't know what induced John Rude to make the change. I only know that the oblique mouth is easier made in the sand than the streight mouth. I know no difference in regard to feeding.

Question 16th. By this change was the company enabled to use any old castings which had been put aside after the injunction in this case?

Objected repeated, and additional objection that it is leading.

Answer. Not that I personally know of at that time.

H. G. SWOPE.

— in the said caption.

In testimony whereof I have hereunto set my hand and seal this 6th day of February, 1885, and of the Independence of the United States 109.

[SEAL.] THOMAS D. EVANS,
Notary Public and Special Commissioner.

390 UNITED STATES OF AMERICA, *District of Indiana,* } *ss:*

I, Noble C. Butler, clerk of the circuit court of the United States within and for said district, do hereby certify that the above and foregoing is a full and true and complete transcript of the record in the case of John M. Westcott *et al.* against Squire B. Rude *et al.*, as fully as the — remains upon the files and records now in my office.

Witness my hand and the seal of said court, at Indianapolis, in said district, this 19th day of October, A. D. 1885.

[Seal Circuit Court of the United States, District of Indiana.]

NOBLE C. BUTLER, *Clerk.*

Endorsed on cover: Indiana C. C. U. S. No. 187. Squire B. Rude, Henry Husted, and Americus E. Johnson, administrators of George W. Rude, deceased, and William M. Snyder, executor of John R. Rude, deceased, appellants, *vs.* John M. Westcott and Henry Lewis, John T. West and Edward A. Ferguson, executors of Charles W. West, deceased. Filed October 27, 1885.

Office Supreme Court U. S.
FILED.
JAN 10 1889
JAMES H. McKENNEY,
CLERK.

Robert Clarke & Co., Printers, Cincinnati.] [*January, 1889.*

Supreme Court of the United States.

OCTOBER TERM, 1888.

No. 187.

Squire B. Rude et al.,
Appellants,

vs.

John M. Westcott et al.,
Appellees.

BRIEF FOR APPELLANTS.

L. HILL,
ARTHUR STEM,
Counsel for Appellants.

Robert Clarke & Co., Printers, Cincinnati.] [*January, 1889.*

Supreme Court of the United States.

OCTOBER TERM, 1888.

No. 187.

Squire B. Rude et al.,
Appellants,

vs.

John M. Westcott et al.,
Appellees.

BRIEF FOR APPELLANTS.

This is an appeal from the Circuit Court for the District of Indiana.

The suit was brought on two patents granted Hiram Moore for improvement in seeding machines, one No. 30,685, granted Nov. 20, 1860, and extended for seven years from 1874, the other No. 31,819, granted March 26, 1861, for seventeen years.

The bill of complaint was filed in March, 1876. Answer was filed in June. The case was then allowed by complainants to rest without taking any evidence for four years.

In 1880, an amended answer was filed, denying title in complainants, denying the validity of the patents sued on, and denying infringement. Proof was taken as to the construction of one of the defendants' machines, and the cause heard.

The court held that the title to the patents was vested in complainants, and the first and second claims of patent No. 30,685 and the sixth claim of No. 31,819 were valid, and infringed by the machine offered in evidence, and ordered a reference to Wm. P. Fishback, and an account. The master filed an account, finding that the complainants had proven an established royalty of $1 on one-horse machines, and $2 on two-horse machines, and that 800 of each kind had been made and sold.

The defendants excepted to this report, and the court, without reverting to the report or evidence as to the number of machines, held that the complainants had not shown an established royalty or license fee, and that:

> "Without further evidence, the plaintiff is entitled to nominal damages; but, that there may not be a failure of justice, the case is remanded to the master, with direction to admit further evidence by each party, if offered, and to report the same and his conclusions." (p. 30.)

Thereupon, the complainants proceeded to take testimony to prove the value of the first claim of patent No. 30,685, abandoning all the other claims. No further testimony whatever was taken as to the number of infringing machines. The proofs already taken showed, as the master reported, that some of the machines which contained the features of one claim did not infringe any of the others. Many of the 1,600 reported infringed patent No. 31,819, but did not infringe this first claim of No. 30,685.

The court says (p. 30):

> "In respect to two or more claims in a patent, each of value, and distinct from one another, one can not equal all in value, any more than in mathematics a part can equal the whole."

As the master reported the number of infringing machines, including all which infringed any one of the three claims, at 1,600, there must necessarily have been less than 1,600 which infringed this first claim of No. 30,685 alone.

Instead of that, we find, by some peculiar process of calculation, that the result of subtracting the number which did not infringe this claim, increases, rather than diminishes the total.

He says (p. 20):

> "The first inquiry is as to the number of grain drills made and sold by defendants which infringed the claim above set out. On this branch of the case, no new evidence has been produced, and, as was stated in the former report, it is impossible to reach a satisfactory result."

Yet he finds a larger number infringing this sixth claim than he had found before, infringing all of the claims, to-wit: 1,000 one-horse, and 1,000 two-horse drills, and the value of this sixth claim to be 75 cents for one-horse, and $1.50 for two-horse machines, making a total of $2,250 damages.

The defendants again excepted to this report. The court filed no opinion on these exceptions, but ordered the following entry (p. 26):

> "This cause came on to be heard on exception to the master's report, and was argued by counsel, and, thereupon, upon consideration thereof, it is ordered, adjudged, and decreed, that the complainants do recover of the defendants the sum of eighteen hundred dollars for the damages sustained by them as complained of in the bill, together with their costs, to be taxed, and a fee of $150 allowed the master, and that execution issue therefore as in an action at law.
>
> And, in so far as the master's report is inconsistent with the foregoing order, the exceptions to said report are sustained, and in other respects, said exceptions are overruled."

The defendants appealed from the decision below. The amount of money involved in this case, is not of itself very important. The suit was brought as a speculation on two old patents about to expire, and which had never been put into use, or manufactured, in order to levy blackmail upon the manufacturers of drills. This suit was made a test case, defended by the contributions of other manufacturers who would be heavily mulcted should this decree be sustained, and who, as Mr. Westcott admits, were waiting to know their rights, by the decision in this case (Rec., p. 57, ans. 17).

As no damages whatever were found for infringement of any claims except the first claim of patent No. 30,685, it is unnecessary to discuss the findings of the court on any other point.

ASSIGNMENT OF ERRORS.

The appellants submit that the court erred:

First. In finding that the title to the letters patent No. 30,685, dated Nov. 20, 1860, and No. 31,819, dated March 26, 1861, was duly vested in the complainants, whereas it should have found that said complainants were not vested with the entire title to the patents sued on, and could not bring suit in their own names, or without joining others who held an undivided legal or equitable interest; and the bill of complaint must be dismissed for misjoinder of parties complainant.

Second. In finding the first claim of patent No. 30,685 valid, whereas it should have found said claim invalid for want of invention, and for want of novelty.

Third. In finding that defendants had infringed said claim.

Fourth. In awarding complainants damages, whereas it should have found that complainants had failed to prove any measure of damages whatsoever, or any definite number of machines infringing the patent, and were entitled to nominal damages only.

Fifth. In overruling defendants' exceptions to the master's report, and each of them.

First Error—Misjoinder of Parties Complainant.

The bill of complaint alleges that the entire title to the patents sued on is in the complainants, John M. Westcott and Chas. W. West, in the following language (Rec., p. 3):

> "And your orators further show unto your Honors, that said Hiram Moore, on the 6th day of October, 1874, by an assignment in writing, dated the day and year last aforesaid, sold, assigned, and transferred unto your orators, John M. Westcott and Charles W. West, all the right, title, and interest of him, the said Hiram Moore, in and to each and all of said inventions and improvements, by virtue of the several letters patent as aforesaid, and also all the right, title, and interest of said Hiram Moore in and to any and all renewals or extensions of either or both of said letters patent, and including the extension of the hereinbefore first-mentioned letters patent (the petition for which extension was then pending before the Commissioner of Patents of the United States, and which extension was, on the 19th day of November, 1874, granted said Hirám Moore as aforesaid), which said assignment was hereafter duly recorded in the Patent Office of the United States, as by said assignment, or a duly authenticated copy thereof, in court ready to be produced, if required, will fully appear.
>
> And your orators further show unto your Honors, that by virtue of the premises and the aforesaid assignment of said Hiram Moore to your orators, your orators, John M. Westcott and Charles W. West, became and now are the sole and legal owners of each and all said letters patent and inventions, and of all the rights and privileges granted and secured thereby, and by the extension thereof as aforesaid, within and throughout the United States."

The defendants' amended answer denies such title in complainants, as follows (p. 11):

> "These defendants, further answering, deny the title of the complainants to this suit, and allege that these complainants have not such title to the letters patent mentioned in their bill of complaint as to enable them to bring suit thereunder against these defendants.
>
> These defendants further allege that, on the 10th day of November, 1874, the said John M. Westcott, by an instrument in writing bearing said date, assigned and sold to Isaac Kinsey and Aaron Morris a certain undivided part of the interest in the letters patent sued on herein, which

said assignment is recorded in the Patent Office of the United States.

. . . .

Wherefore, these defendants again allege the want of sufficient title in the complainants to enable them to maintain this suit, and they pray as they have heretofore prayed."

The instrument of assignment under which complainants claim title from the patentee, Moore, is found on page 97 of the record, and the assignment from Westcott to Kinsey and Morris on page 96. If, as alleged in the bill of complaint, the entire right, title, and interest in said patents had been transferred to Westcott and West, Westcott could and did assign a portion of his undivided interest to Kinsey and Morris, who must be joined as complainants. If West and Westcott did not take the "entire right, title, and interest in the patents," as alleged, they hold, for at least a part, as trustees for Moore, and Moore must be joined as party complainant.

For convenience, we will refer to these assignments or contracts as No. 1 and No. 2; that between Moore, Westcott, and West as No. 1, and that between Westcott and Kinsey and Morris as No. 2.

Contract No. 1 (*p.* 97).

Recorded February 4, 1878.
Examined: E. A. M., L. J.
Liber Q. 18, p. 269.

This agreement, made this sixth day of October, Anno Domini one thousand eight hundred and seventy-four, by and between Hiram Moore, residing near Ripon, in the county of Fond du Lac, and State of Wisconsin, party hereto of the first part; Charles W. West, of Cincinnati, in the county of Hamilton, and State of Ohio, party hereto of the second part; and John M. Westcott, of Milton, in the county of Wayne, and State of Indiana, party hereto of the third part, witnesseth:

That, whereas, sundry letters patent of the United States heretofore have been granted to said Moore, which said letters patent are respectively numbered, entitled, and dated as follows, to wit: No. 30,685, dated November 20, 1860, and entitled "improvement in seed drills," and No. 31,819, dated March 26, 1861, and entitled "improvement in seed drills;"

And, whereas, the said Moore is justly indebted unto the said Charles W. West in the full sum of ten thousand dollars for money advanced to aid him, the said Moore, in perfecting his inventions, and is desirous of securing the repayment of the same;

And, whereas, the said Westcott is desirous of acquiring an interest in the inventions and letters patent aforesaid, and in any reissue, renewal, or extension thereof:

Now, therefore, know all men by these presents, that, for and in consideration of the premises and of the sum of five dollars in lawful money to me in hand (by the said West and Westcott, before the execution hereof) paid, and of other valuable considerations me thereunto moving, I, the said Hiram Moore, do hereby assign, sell, and set over unto the said Charles W. West and John M. Westcott the entire right, title, and interest in and to the letters patent aforesaid, and in and to the invention and improvements represented, shown, or described therein, including any renewal, reissue, or extension thereof, the same to be held and enjoyed by the said West and Westcott and their legal representatives as fully and entirely as the same would have been held and enjoyed by me, had this assignment and sale not been made to the full end of any term or terms for which the letters patent aforesaid or either of them have been or hereafter may be granted, reissued, renewed, or extended.

I hereby further agree to sign such lawful papers and do such lawful acts as may, by the counsel learned in the law of the said West and Westcott, be deemed necessary or expedient in order to obtain an extension or reissue of the patent aforesaid, or to assert, maintain, or defend the rights secured by said letters patent. It is expressly understood, however, that the costs and charges of the proceedings aforesaid shall be defrayed by the said West and Westcott, as hereinafter provided.

In consideration of the premises, I hereby further make, constitute, and appoint the aforesaid Charles W. West and John M. Westcott, my true and lawful attorney in law and in fact, with power irrevocable, giving and granting to them full and exclusive and unreserved power and authority for me and in my name, place, and stead to assume and take upon themselves the entire and exclusive management and control of the aforesaid letters patent, and of each and every of them, and to dispose of all the rights, title, and interests which I have under the same and under each and every of them for such price or prices, upon such terms and to such persons and for such place or places as they, my said attorneys, shall deem proper, and in my name, place, and stead, and as my own proper act and deed, to sign, seal, deliver, and acknowledge all such deeds and instruments of writing as shall be necessary or proper for the granting or licensing to others the said rights under the said letters patent, and to each and every of them, and to ask, demand, sue for, and receive the price or fees or any part or parts thereof paid or payable for such grants or licenses, and in my name to execute and deliver receipts and acquittances therefor, and in my name to bring to account and reckoning, and to ask, demand, sue for, and recover and receive of and from all and any person or persons whomsoever who may have been or may be manufacturing or selling seed drills containing the improvements aforesaid, or by any or either of them, such reasonable price or fee for such use of said improvements, or either of them, as my said attorneys shall deem proper and reasonable, and on receipt or recovery thereof, or of any part or parts thereof, to execute in my name such good and sufficient receipts, releases, and discharges for the same as my said attorneys shall deem proper, and to liquidate and discharge the same, and on the neglect or refusal of any such manufacturer or manufacturers as aforesaid lawfully to account for the use of said improvements, or of any or either of them, and to pay such reasonable prices or fee for such use, and to agree to pay a reasonable royalty therefor, or for the right to continue the use of said improvements, or of any or either of them, to take all such legal ways and means for securing and enforcing the payment thereof, or to stop the unauthorized use of said improvements, or any or either of them, by action, suit, or otherwise, as they, my said attorneys, may deem expedient, and in my name to prosecute as they may deem expedient, all or any actions or suits at law or in equity, or other proceedings before any tribunal against any person or persons brought by or under my said attorneys, and therein to proceed to judgment, or to discontinue or to compromise the same, as they, my said attorneys, shall deem expedient, hereby authorizing and empowering my said attorneys to substitute and appoint under themselves one or more special attorneys to do or perform any act, matter, or thing which they themselves might lawfully do by virtue hereof, and generally to do, perform, and execute, in my name as aforesaid all and whatsoever other acts, matters, and things that they may deem expedient and requisite, or may be advised to do in and about the premises as fully and effectually, to all intents and purposes, as if I, myself, were present and did the same, I, the said Hiram Moore, hereby, ratifying, allowing, and confirming, and agreeing from time to time and all times hereafter to ratify, allow, and confirm as good and valid all and whatsoever the acts, matters, and things which my said attorney or their substitutes shall lawfully do, or cause to be done, in and about the premises by virtue of these presents.

And I, the said Hiram Moore, hereby covenant and agree with the said West and Westcott to do no act or thing to diminish the powers hereby conferred upon them or to hinder or embarrass them in the execution of this power, which is hereby intended and declared to be irrevocable.

I hereby revoke, annul, and disallow any and all powers of attorney heretofore given by me in this behalf.

It is hereby agreed by and between the parties hereto that this agreement is to supersede and take the place of any heretofore made between said Moore and J. M. Westcott aforesaid, and that the entire right, title, and interest in the letters patent aforesaid, has been, up to the execution of these instruments. vested in the said Hiram Moore.

The said John M. Westcott, for his part agrees, at his own cost and charges to procure the extension of said letters patent of Nov. 20, 1860, now pending, if practicable, including the expenses already incurred, as well as those which may hereafter be incurred in said behalf, which sum is to be paid absolutely whether said extension be granted or not, and in no event is any part of said sum to be reclaimed from or refunded or repaid by said Moore, or to be deducted from the sum or sums collected under said patent.

It is hereby covenanted and agreed by and between the parties hereto as follows:

That from the sum or sums collected under the letters patent aforesaid, from sales, royalties, or settlements, or from any other source, shall first be deducted the costs, charges, and expenses of collecting the same, including all litigation expenses save those of the extension application, and then the net profits or receipts shall be divided among the parties hereto as follows: To Hiram Moore, or his legal representatives, one-fourth part; to C. W. West, or his legal representatives, one-fourth part; to John M. Westcott, or his legal representatives, one-half part. In case of loss or failure to realize any profit under said patents, all litigation or expenses aforesaid are to be paid by said Westcott, it being expressly understood by the parties hereto that under no circumstances are said Moore or West to incur any obligation or be under any liability for said expenses.

It is further agreed that John M. Westcott is to make no charge for his own time spent in this behalf, nor is said West to make any charge for his services. It is also expressly understood that said Moore's interest is to continue during and throughout the extended term of the patent of Nov. 20, 1860, should such extension be granted.

The parties hereto hereby agree in good faith to perform the covenant between them made.

In testimony whereof the parties hereunto have affixed their hands and seals this day and year first above written.

HIRAM MOORE. [SEAL.]
C. W. WEST. [SEAL.]
J. M. WESTCOTT. [SEAL.]

Contract No. 2 (p. 96).

Liber M 22, p. 374, D:

Whereas heretofore, to wit, Oct. 6, 1874, Hiram Moore, of Fond du Lac county, Wisconsin, Charles W. West, of Cin., Ohio, and John M. Westcott, of Milton, Indiana, entered into a contract and article of agreement in relation to certain improvements in grain drills, for which letters patent have been issued to said Moore, No. 30,685, dated Nov. 20, 1860, and No. 31,819, dated March 26, 1861, in which agreement, amongst other things, the said Moore assigns and conveys to said West one-fourth, and to said Westcott one-half, and retains for himself one-fourth, of said interest contained in said letters patent for said improvements in said grain or seed drills. In said agreement said Westcott on his part agrees at his own cost and charges to procure the extension of said letters patent of Nov. 20, 1860, including expenses already incurred, as well as those that may hereafter occur, in said behalf, to be paid whether said extension be granted or not, and in no event is said sum or any part thereof to be reclaimed from or refunded by said Moore, and that from sums collected under said letters patent from sales, royalties, or settlements, or from any other source, shall first be deducted the costs, charges, and expenses of collecting the same, including all litigation expenses save those of the extension application, and then the net profits or receipts shall be divided among among said parties—to said Moore one-fourth, said West one-fourth, and said Westcott one-half part. In case of loss or failure to realize any profit under said patents, all litigation expenses aforesaid are to be paid by said Westcott, said Moore or West to be under no liabilities for said expenses. Said Westcott is to make no charge for his own time spent in this behalf, nor is said West to make any charge for his services. Said Moore's interest is to continue during and throughout the extended term of the patent of Nov. 20, 1860, should said extension be granted; and, whereas, in consideration of the foregoing, Isaac Kinsey and Aaron Morris, of Milton, in Wayne county, Indiana, are desirous of obtaining an interest in said letters patent, they hereby agree to and with said John M. Westcott, of the same place, to severally take an equal interest with him in the same;

Therefore, these articles of agreement witnesseth, that said John M. Westcott hereby agrees to and with said Isaac Kinsey and Aaron Morris, and does hereby set over and assign to each of them one-third part of his said one-half interest, retaining one-third part himself in said letters patent; and said Kinsey and Morris, fully understanding the original agreement mentioned, do hereby agree to and with said Westcott, jointly, as set forth in said agreement, and shall be equally entitled and receive one-third profit or proceeds, if any, in said half interest, and in all things pertaining hereto to be governed by this and the original contract and agreement.

In witness whereof, we have hereunto set our hands and affixed our seals, this 10th day of November, 1874.

J. M. WESTCOTT. [SEAL.]
ISAAC KINSEY. [SEAL.]
AARON MORRIS. [SEAL.]

The construction of contract No. 1 may be discussed on three theories, to wit:

First. The theory that it is an assignment from Moore to West and Westcott of the entire legal and equitable estate in the patent, coupled with a contract between the same parties by which West and Westcott were to pay one-quarter of the net proceeds to Moore.

Or, *secondly*, the theory that it was an assignment of the entire legal interest to West and Westcott in trust for the benefit of themselves and Moore.

Or, *thirdly*, that it was an absolute assignment of one undivided quarter to West, one undivided half to Westcott, in their own right, and the remaining undivided quarter to West and Westcott, jointly, as trustees for the benefit of Moore.

Which of these three theories is maintainable?

The first theory can not be sustained in view of *Seymour* v. *Freer*, 8 Wall. 202, which case it is submitted is absolutely conclusive of the point. In that case Seymour held land purchased with his own money under an agreement that when sold one-half of the net proceeds should be paid to Price for his services in purchasing and locating the lands. The lands were afterward sold at a large profit, but Seymour refused to pay over the net one-half to Price.

Price's legal representatives brought a suit in equity against Seymour's heirs to charge the proceeds of the lands in their hands with the moneys due to Price.

Seymour's counsel, among other points, made the very point that is made here in this case, to wit, that there was no trust in favor of Price in the lands or their proceeds, but that the heirs of Seymour held the absolute estate therein, and, if liable at all to Price, were liable only in an action at law for the debt, which action should be brought against the administrator or executor.

The Supreme Court held otherwise, to wit, that the estate was, to the extent of Price's interest, an equitable estate, in which Seymour held the legal title in trust, for the benefit of Price, to the extent of Price's interest, and they state in their opinion that this trust was a charge upon the land and its proceeds, *and an interest in the property itself.*

This cause involves exactly the same principle and is governed by the same rule. Moore was to have a quarter part of the net proceeds of all sales, etc. That was the consideration in part for which he assigned the patents to Westcott and West. His one-quarter interest in the net proceeds assumes the same legal position and character that Price's one-half interest in the net proceeds of the land assumed, to wit: an interest in the property itself as *cestui que trust.* We may, therefore, dismiss from further consideration the first theory above referred to.

The second point which we make is, that the second and third theories are precisely the same in legal effect. That is to say, that, if it be held that contract No. 1 is to be construed as an assignment of the patent to West and Westcott, jointly, as trustees, for the benefit of themselves and Moore, to the extent of their respective interests in the net proceeds, then the operation of this construction is to vest one-quarter of the patent absolutely in West, one-half absolutely in Westcott, and the remaining one-quarter in West and Westcott jointly, as trustees, for the benefit of Moore. This results from the operation of the law of merger.

An estate may merge for one part and continue for the remaining part.

4 Kent Com. 101.
3 Preston on Conv'g, 88, 89.

The merger is co-extensive with the interest merged, as in the case of joint tenants and tenants in common, and it is only to the extent of the part in which the owner has two several estates.

4 Kent Com. 100.
3 Preston on Conv'g, 88, 89.

"Where the legal and equitable interests unite in the same person, they always merge in law, and will merge in equity unless the purposes of justice or the intent of the parties are against it."

4 Kent Com. 102.
Hill on Trustees, 252, and the authorities cited in note thereto.

"Where the legal and equitable estates become vested in the same person, the latter will be absorbed and merge in the former; for a man can not be trustee for himself."

Ibid.

Where the estate becomes vested in trustees, one of whom is to take a beneficial interest in the trust property, he takes an absolute estate to the extent of such interest; and that interest may be seized and sold under execution.

Bolles v. *State Trust Co.*, 27 N. J. Eq. Rep. 308.
Wills v. *Cooper*, 1 Dutcher, 137.
Mason v. *Mason's Ex'rs*, 2 Sand'f. Ch'y, 433.

The case of *Bolles* v. *State Trust Company*, above cited, is, we submit, conclusive of the whole question. The estate was vested in two trustees jointly, just as this suggested construction of contract No. 1 here assumes. It appeared that *one* of the trustees had an equitable interest in the final distribution of the property. That trustee was indebted to an outside party, who brought suit and obtained a judgment, upon which execution issued. He was about to levy the execution upon the said interest of the trustee, upon the advice of counsel that such interest by operation of merger had become an absolute legal estate and was liable to be seized and sold on execution. The trustee brought his bill in equity for an injunction to restrain the levy and sale, on the ground that there was no merger; but the court held that no man can be a trustee for himself; that the legal and equitable estates had united in the same person, and that the legal estate was as large as, or larger than, the equitable interest, and, therefore, the merger must necessarily take place. The injunction was refused upon that ground.

Upon the authority of that case, and the other authorities and cases above cited, we submit that, if West and Westcott took the entire legal title jointly as trustees for the benefit of West to the extent of his one-quarter of the proceeds, of Westcott to the extent of his one-half of the proceeds, and of Moore to the extent of his one-quarter of the proceeds, then West and Westcott took legal titles, which were as large as their respective equitable interests, and in which their equitable interests merged; thus giving West a full absolute estate in one-quarter of the patent, and Westcott a full absolute estate in one-half of the patent, leaving the remaining quarter in trust in the names of West and Westcott for the benefit of Moore.

It will be seen, from *Bolles* v. *State Trust Company* and other authorities cited, that the fact of the legal title being vested in two or more trustees jointly does not prevent the separate equitable interests of one or more of the trustees from merging; nor does the fact that only part of the interest merges affect the question, for it may merge as to part and continue as to the residue, the rule being that the entire equitable interest merges whenever the legal title is large enough to receive it, which was the fact in the case now before this court.

We have thus seen that the first theory can not be maintained, in view of *Seymour* v. *Freer*, and that in view of all the authorities, the second and third theories amount to the same thing, to wit: that by contract No. 1, West took an absolute estate in one-quarter of the patents, Westcott an absolute estate in one-half of the patents, and West and Westcott, jointly, as trustees, took the remaining one-quarter interest for the benefit of Moore, their *cestui que trust.*

This, it will be observed, is not only the construction which the *law* and the rules of equity place upon the contract, but it is the construction which the parties themselves put upon it at the time. This is shown by Westcott's statement of the title in the contract No. 2, and by West's deposition, on file in this case.

Our next point is that the absolute estate which Westcott thus took in the patents was assignable by a writing signed only by himself.

On this point we remark, first, that the interests which exist in the several owners of a patent, granted to them or acquired by them jointly, is an interest in the nature of a tenancy in common, and not of a joint tenancy. The distinguishing characteristic of a joint tenancy is the right of a survivor to take the entire estate. This characteristic is not found in joint interests in patent rights, but on the contrary, in case of the decease of any one of the joint owners, his interest descends to his heirs at law. Such an estate can not be a joint tenancy, for it lacks its distinguishing and essential characteristic.

1 Wash. Real Prop. 406.

1 Bouvier's Law Dict., Art., "Estate of Joint Tenancy."

Where a patent issues to two persons, jointly, and one of them afterward dies, the share of the deceased patentee does not go to the survivor, but to the heirs of the decedent.

The N. W. Fire Extinguisher Co. v. *The Phila. Fire Extinguisher Co.*, 6 O. G. 34. (McKennan, J.)

Whittimore v. *Cutter*, 1 Gall 31. (Story, J.)

That the assignees of a patent take as tenants in common, and not as joint tenants. See also Curtis on Patents, sec. 186 to 192. Hindmarch on Patents, pp. 67, 68, 236, 252.

Parkhurst v. *Kinsman*, 2 Blatch. 72; 1 Blatch. 488 to 496.

Clum v. *Brewer*, 2 Curtis, 506.

Voss v. *Singer*, 4 Allen, 226.

Matthers v. *Green*, 1 Law Reports Chancery Appeals, 29. (Lord Cranworth.)

Dunam v. *Indianapolis and St. Louis R. R. Co.*, 9 Chicago Legal News, 55.

Herring v. *Gas Consumers Assn.*, 13 O. G. 637.

Such being the nature of the estate, it follows that any party holding a joint interest with others in a patent, may convey away his interest in the patent, by his own deed, the same as any other tenant in common. Any undivided interest is assignable. Revised Statutes, sec. 4898.

Potter v. *Holland*, 4 Blatch. 206; 1 Fish, 327.

Parker v. *Haworth*, 4 McLean, 370.

Westcott, having an assignable interest in the patent in his own right, proceeded to assign an undivided portion of that interest to Kinsey and Morris, as shown by contract No. 2, and this assignment conveyed to each of them absolutely the interest which it purported to convey, to-wit: To each of them an undivided sixth part of the entire patent. So that from that date the patent was held and owned by West, Westcott, Kinsey and Morris, each in his own right, to the extent of his undivided interest, and the remaining undivided interest, to-wit: One-quarter of the patent was owned and held by West and Wescott, jointly as trustees, for the benefit of Moore, their *cestui que trust.* Subsequently to the beginning of this suit, Kinsey assigned a portion of his undivided interest to L. L. Lawrence, and the Wayne Agricultural company, of Richmond, Ind., who now hold the same.

It may also be noted that a *patent*, as well as any other property, may be held by a person, in part in his own right absolutely, and in another part as trustee for somebody else.

Stimson v. *Rogers et al.*, 4 Blatch. 333, 337.

It makes no difference that the assignment took place before the extension of the patent was granted. An extension of a patent is assignable before the grant of an extension.

Nicholson Pav. Co. v. *Jenkins*, 14 Wall. 456.
Clum v. *Brewer*, 2 Curtis C. C. 506.
Curtis on Pat., sec. 208.
Ruggles v. *Eddy*, 10 Blatch. 52.
Mowry v. *R. R. Co.*, 10 Blatch. 89.
R. R. Co. v. *Trimble*, 10 Wall. 367.
Gaylor v. *Wilder*, 10 How. 477.
Wilson v. *Rosseau*, 6 How. 646.

In *Railroad Company* v. *Trimble*, the assignment was almost exactly like that made by Moore, and like that made by Westcott in this case, to-wit: an assignment to Trimble and his legal representatives of an extension of letters patent before the grant of such extension. Trimble afterward assigned a part of his interest. *Held*, that the title to the extended term vested by the assignment which was made before the extension was granted, and that no further assignment afterward was necessary.

Such being the state of the title at the commencement of this suit, it was, then, absolutely necessary that Morris, Kinsey, and Moore, should all be joined as parties complainant. That Morris and Kinsey, who owned an undivided interest in the patents, themselves should be joined, is a principle too well settled and familiar to this court to require citation of authorities. Their non-joinder is absolutely fatal to this suit, or any other suits for infringement of the patents.

But that Moore also should be joined is a proposition well settled. He held and still holds an equitable interest in the subject-matter of the suit, and his interest may be strongly affected by the proceedings of the suit; he should be here to take care of such interests.

The court can not proceed to administer upon his property without his intervention in the controversy.

It is a general principle, admitting of a very few exceptions, that a trustee can not, under ordinary circumstances, institute proceedings in equity relating to the trust property, without making the *cestui que trusts* parties to the proceeding.

1 Danville Ch. 267.

That this rule applies in infringement suits brought upon letters patent is settled by numerous decisions by the United States courts, of which we will cite but one or two, as conclusive of the question.

In the *Northwestern Fire Extinguisher Company* v. *Philadelphia Fire Extinguisher Company*, 6 O. G. 34, the patent issued to two persons, jointly, and one of them afterwards died.

The patent was afterwards reissued to the administrator of the decedent jointly with the survivor. On this state of facts Judge McKennan *held* that the administrator, so far as he took part of the title, took it in trust for the heirs; and that in an equity suit brought on the patent for infringement, such heirs, being *cestui que trusts*, *must* be made parties to the suit.

The same point arose in *Stimson* v. *Rogers et al.*, 4 Blatch. 333, 337, where the court *held* as follows:

> "Is Julia M. Coburn a proper party plaintiff in the bill? Sophia E. Stimson has now the legal title to the patent. Julia M. Coburn has no legal right in the patent. She can not be a party plaintiff in an action at law for an infringement of the rights secured by the patent. She has, however, an equitable right to one-third of the patent.
>
> Sophia E. Stimson holds one-third of the patent for the use of Julia M. Coburn—in trust for her. Her rights are seriously affected by the infringement of the defendants. Where one person has the legal right to the patent and another person has an equitable right in the same, and a suit in equity is instituted complaining of an infringement and seeking an injunction and account, the person having the legal right and the one having an equitable right which has been violated, should join as plaintiffs. *This is the universal course.*"

It needs no further citation of authorities to show that this suit must be dismissed for want of proper parties complainant.

But the suit must be dismissed for still a further reason. The bill declares on an absolute title in West and Westcott, full and complete, legal and equitable. The evidence, however, both for the complainants and defendants, shows that this allegation of title is incorrect.

The title which is proved is, as we have seen, an absolute title in West, Westcott, Kinsey, and Morris to a part, and a legal title in West and Westcott for the benefit of Moore as *cestui que trust* to another part. All these things should have been set out in the bill. Without them, the allegations and proofs do not correspond, and the latter do not sustain the former.

In equity, the *allegata* and *probata* must agree. A case proved, but not alleged, is no better than a case alleged, but not proved.

Rubber Co. v. *Goodyear*, 9 Wall. 793.
Harrison v. *Nixon*, 9 Pet. 503.
Foster v. *Goddard*, 1 Black, 518.
Simms v. *Guthrie*, 9 Cranch, 95.

Moreover, the parties having stated in their bill that Westcott and West hold the patent absolutely in their own right, are estopped by their own pleadings to deny that fact. If that be true which they are thus estopped to deny, then West and Westcott, as absolute owners in the patent, as tenants in common, could each assign his own interest, or any part thereof, to Kinsey, or Morris, or any other persons, and the assignment of Westcott to Kinsey and Morris stands good against the complainants on their own pleadings.

When we show an assignment from Westcott, who, as they allege by their pleadings, had an absolute ownership and an absolute right to assign, it does not lie in their power to then come into court and say that Westcot did not have the absolute right as alleged in the bill. If they intended to meet our proof of his assignment to Kinsey and Morris by a denial of his absolute title, they should so have alleged in the bill. If they could not anticipate our defense, when they filed their original bill, they were fully advised of it by the filing of our amended answer.

Under the rules of equity pleading which govern this court, they had then two courses open to them, to wit, either to amend their bill to meet and avoid the allegations of our amended answer, or to file their replication, and put its allegations in issue. They chose the latter alternative. The issue, as thus made up, is simply whether or not John M. Westcott did execute to Kinsey and Morris a conveyance of a portion of his interest in the patents. Upon this issue, the proofs fully support the amended answer. The bill shows the right of Westcott to assign, the answer declares that he did assign, the replication puts that allega-

It is now insisted by appellees that West and Westcott took the legal title as "joint trustees" for themselves. In their bill of complaint, they allege that they are the sole owners of the patents sued on. They do not sue as trustees, but as absolute owners.

It is submitted by appellants that the position now assumed by appellees presents a very appropriate case for the application of that well-settled rule of law, that a party can not, in the course of litigation, occupy inconsistent positions.

This action was brought under the contract between Moore and West and Westcott, which, as counsel for appellees admit, is inconsistent in its terms and ambiguous and uncertain. The parties to this contract are primarily the interpreters of it, and, so long as they agree upon an interpretation and make it known, the world has a right to accept and act on that interpretation.

In this suit, brought under the contract, we submit that appellees have interpreted it; they say, in their bill of complaint, that this contract was an assignment; that under it, Hiram Moore sold, assigned and transferred all his right, title and interest; and that, by virtue thereof, they are the sole and legal owners of all said inventions and letters patent. Here was a contract that was clearly capable of several constructions; what the exact intent of it, whether it established a trust or not, is of no consequence. The contract was ambiguous and uncertain, and the parties themselves undertook to interpret it and to elect what position they would take in suits brought under its provisions. They formally adopted, by their allegation in this bill, an interpretation which made them the sole and legal owners of *all* the right, title and interest of Hiram Moore in these patents; and they so notify appellants. And for the purposes of this suit, having taken that position, they are bound to retain it to the end. Appellants examined the records at the Patent Office and found that one of the parties had sold a part of his interest before suit; are they not justified in refusing to settle until these new owners are made parties to the suit.

When appellees have formally notified appellants that they are the sole owners of their rights, and that they construe this ambiguous document as an absolute assignment, have not appellants a right to rely on this interpretation, without looking into the contract to see whether such interpretation is correct or not? The position now taken by appellees is utterly inconsistent with their position taken at the commencement of this litigation. Then they took their stand as sole owners, and we met them on that issue, and have proved that, if the assignment under which they sued made them sole owners of all the right, title, and interest of Moore, then we were right in refusing to comply with their demands, for other parties should have joined with them. They sue under a confessedly ambiguous and inconsistent contract; and, in so doing, they are obliged to and do interpret it in a certain way. Relying on this construction, defendants take issue with them, and show that they are not the proper parties; when straightway they propose to "mend their hold," which, we submit, they can not do. The appellees brought their suit under a certain writing, which, they say, is an assignment, and which, they allege, made them the owners of certain rights; and yet now they propose to deny the validity of that assignment. They sue, in effect denying that they are trustees; and yet, forced by the exigencies of their case, they now propose to hold these appellants liable, on the ground that they are trustees.

Bigelow on Estoppel, Chap. XXIV:

> "It may accordingly be laid down as a broad proposition, that one who has taken a particular position in the course of a litigation must, while that position remains unretracted, act consistently with it."

R. R. Co. v. *McCarthy*, 9~~5~~6 U. S. 258, and cases cited there.
Daniel v. *Morton*, 13 Q. B. 198.
Dryfoos v. *Adams*, 48 Cal. 131.
Dumming v. *West*, 66 Ill. 366.
~~Group~~ v. *~~Trimble~~*, 66 Ill. 428. Crouk v Trumble
Thurlough v. *Kendall*, 62 Me. 166.
Callaway v. *Johnson*, 51 Mo. 33.
McQueen v. *Gamble*, 33 Mich. 344.

Again, the complainants must prove their title, as alleged.

If the agreement between Moore, West and Westcott made complainants trustees for themselves and Moore, they must sue as such trustees.

Being, as they now insist, trustees, they can not maintain a suit in their own names as the sole and individual owners.

tion squarely in issue, and the proofs fully support the answer. This, of itself, is fatal to the suit.

Second Error.

The court erred in finding the first claim of patent No. 30,685, of November 20, 1860, to be valid.

This claim is as follows (p. 82):

> "First. I claim the conduit or passage, H, arranged between the bottom of the hopper and the discharge, in combination with the oblique discharge, I, and the tooth-distributing cylinder, C, substantially as described and for the purpose herein specified."

The alleged invention relates to what are known as "force feed" grain drills. Prior to the introduction of force feeds, what were known as gravity or slide feeds were used, which consisted of a hopper converging toward the bottom, and having an opening through the bottom. The size of this opening was regulated by a slide, whereby the opening was made larger or smaller, to sow more or less grain. To insure the continuous passage of the grain through the opening, agitators were used which kept the grain over the opening constantly stirred up, and caused it to drop through the hole in a steady fine stream. These feeds were not always reliable, and about 1840, force feeds were introduced (Rec., p. 50, ans. 4–8).

There are many hundreds of patents on these force feeds for modifications and improvements. The general principles of their construction, however, are all substantially the same. They consist of a cup open at one side, in which revolves a toothed or fluted wheel; the cup, which is suspended beneath the hopper, fills with grain, which is forced out by the teeth or flutes of the wheel, the grain passing down behind the wheel, under it, and thence out.

In Moore's drill one cup was used to supply grain to two drill teeth or coulters, thus requiring but half the usual number of cups. The cup and fluted wheel were made long enough to carry and supply a double quantity of grain. As the flutes were horizontal, they formed little long narrow buckets. And, according to Moore's theory, as one of these buckets came to the edge of the discharge opening, its entire contents would be poured into the coulter or tooth and pass down in a bunch. This, probably, was true in Moore's construction. To remedy this, Moore made the edge of the opening V-shaped to form a spout as it were; just as the edge of tin dippers were made one hundred years ago; just as the edge of hundreds of household utensils have been made time out of mind, every iron kettle, almost every metal vessel for holding liquids has been provided with such an edge for concentrating its contents as they are poured out. This is what Moore did.

He did what any mechanic would do when he had a broad pouring or discharging surface, and desired to discharge a small stream. He says in his patent, page 80, in stating the novel features of his invention:

> "They consist, first, *in combining* a conduit or passage for the grain arranged between the bottom of the hopper and the discharging orifice *with the oblique discharging orifice* and the distributing cylinder; second, . . ."

There are three elements named in the claim, to wit:

> "The conduit for the passage of the grain under the fluted wheel, the oblique discharge, and the toothed or fluted distributing cylinder."

The distributing cylinder was old, it being used in all force feeds; the passage for the grain was old, as no force feed could be used without it; the straight or horizontal discharge was, of course, old, the improvement consisted simply in making it oblique, or converging toward the middle, to cause the contents to pass out more in a stream than in bunches or buckets full. We can see no invention in applying a spout or "oblique discharge" to the cup of a grain feeding device, any more than in applying it to a cup of any kind.

In the specification, mention is made of the slight elevation of the discharge, to keep the grain from dropping out by gravitation; but this is not mentioned or claimed as new, as it was common to force feeds, a necessary condition; otherwise, the grain would flow out whether the machine was in operation or not, and become a gravity feed without the slide. It is one of the essential features of a force feed.

The complainants below so construed the patent, and insisted that it covered any form of passage for the grain back of and under the seed wheel. Upon that construction they insisted throughout; and so put their questions to all the witnesses on the accounting. The value was based upon any passage with oblique discharge, as compared with a feed which had no passage at all, and which, as the witnesses say, would be worthless.

We submit, then, that there was no invention in this claim, if broadly construed to cover a grain cup with a V-shaped discharge or spout. It may be valid in Moore's particular combination, where one long cup and cylinder is used to convey grain out of the cup, but the defendants use no such construction.

The defendants do not, on most of their machines, not on the one held to infringe, use an "oblique discharge" at all, but one that is slightly rounded, simply for convenience in casting, as explained by Mr. Rude (p. 167):

> "Q. 128. You say, in answer to question 49, that for the drills made in 1873, the patterns were a little rounded up at the discharge orifice. By whose orders was this done?
>
> [Objected to as immaterial.]
>
> A. They didn't have any orders at all, as I know of. I'm positive almost that they didn't have any orders.
>
> Q. 129. Why was it done, and by whom?
>
> [Objected to as immaterial.]
>
> A. I suppose the reason it was done was to make it so that a poorer class of molders could mold the cups and make them perfect; the parties that made the patterns. I suppose the Dayton Machine Company did it. I never knew exactly who did it."

The claim may be valid for the *combination named*, if it is construed as limited to a cup containing a long feeding cylinder, in which the oblique discharge is necessary for the purpose described; but if it is held to cover a rounded or spout-shaped discharge in any grain cup, it is invalid.

Third Error.

The court erred in finding that defendants' machine infringed the first claim of patent No. 30,685.

We admit that if the claim is construed broadly, to cover any spout-shaped opening or discharge in a grain drill feed, whether it is combined with a long or short cylinder, whether it accomplishes the result claimed or not, then one form of defendants' machines may be held to infringe. If it is limited to the combination shown in the patent, where it is needed and used for a particular purpose, then neither form of defendants' machine infringes.

At the hearing of this cause, when the court found the patents valid and infringed, only one form of defendants' machine was in evidence. When the case was before the master, another form of seed cup was put in evidence by complainant, which the master held came within the claim. The difference between these two devices illustrates the wide expansion this alleged invention has been allowed.

In force feeds two methods are employed to regulate the quantity of grain sowed. One is by changing the rapidity of the revolution of the toothed wheels or cylinders. To sow heavily they are revolved fast, to sow lightly they are revolved slowly. To this class Moore's machines belong. The other method is one which came into use long after Moore's patent. It consists in employing a wide cup, into which the end of a fluted cylinder is introduced from the side, moving horizontally. The further this fluted cylinder extends into the cup, the greater portion of its fluted part will come in contact with the cup of grain, and the greater amount will be fed. In this latter class the oblique discharge is of no earthly use, and if used at all it is simply because an obtuse angle or curve is more easy to draw out of the sand in casting than an acute angle, as stated by Mr. Rude (p. 167).

The first form of defendants' machine is shown in "Complainant's Exhibit, Defendant's Hopper, with Seed Cups and Driving-shaft."

It will be seen that the mouth or discharge is slightly rounding or V-shaped, instead of square, as shown in exhibit seed cup, A No. 2. It would be very difficult to cast the cups in any other way. It would be the natural way in which any mechanic would make them. It certainly does not constitute or involve invention. It was not made for the purpose described in the patent, nor is it needed or used for that purpose. There is no long fluted cylinder feeding grain in bunches, but a narrow wheel pushing out of the cup only a grain or two at a time. There is no occasion for any particular form of opening. If the claim is valid at all, it should be confined to "an oblique discharge in *combination with* the toothed distributing cylinder, C," shown and described in the patent. In such a feed, it may be desirable, it may do better work, but in defendant's device, it accomplishes no good whatsoever, and to sustain this claim of infringement, would be equivalent to say that because Moore used a spout-shaped opening where he needed it, with a long cylinder, to accomplish a particular purpose, others using a different combination, a narrow cylinder or wheel, where a spout-shaped discharge can accomplish no such purpose as in Moore's machines, because it is not needed, and with any form of conduit, still they infringe, because Moore's claim covers it with any toothed distributing cylinder, and any conduit. If Moore had been the first to make the great discovery, that the contents of a vessel would pour more easily and steadily by using a spout-shaped discharge to concentrate them into a stream, such a construction might be tenable; but he was not. Even if it involved invention to apply this well-known fact to a grain cup with his long toothed feeding cylinder, to accomplish a particular result, it does not give him the sole right to its use, even in a seed cup, where it accomplishes no such result. Defendants use it for convenience and economy in casting. It makes absolutely no difference in the operation or flow of the seed, as seen in exhibit, "Seed cup, A No. 2." In defendants' cup, the perpendicular walls are brought so near together that there is no possibility of discharging long, narrow buckets full of grain, hence no possible bunching. Defendants do not use a fluted seed wheel—no "buckets full" or "bunches" are gathered to be discharged. The patent, to be held valid at all, must be limited to the combination of the oblique discharge, with a long, fluted or toothed distributing cylinder, calculated, without the oblique discharge, to gather the grain in bunches. Thus construed, neither form of defendants' machine can be held to infringe. Again, the claim is for a *combination* of three distinct elements, "the conduit or passage, H, the toothed distributing cylinder, C, and oblique discharge, I." The master found (and the court sustained the finding), as follows :

> "Besides this, it appears that some of the so-called infringing machines did not use all the elements of the combination described under the first claim above mentioned. In some of them, the 'oblique' discharge, I, was not used, but what is called a 'straight' discharge was substituted therefor.
>
> To this it is answered that the 'straight discharge' is the mechanical or practical equivalent of the 'oblique discharge,' and that the use of the conduit, H, and the toothed cylinder, 'C,' in combination with the 'straight discharge,' is as much an infringement of complainants' claim as if the 'oblique discharge' were used.
>
> The merit claimed for the oblique discharge was that the grain was delivered from the discharge orifice in a steady flow, while the straight discharge would deliver it in bunches. Theoretically, this seems to be so, but practically, and as shown by the tests made in the master's office and the experiments testified to by the witnesses, there seems to be very little, if any, difference in this respect."

A claim for a combination is not infringed by the use of only a part of the combination.

Prouty v. *Ruggles*, 16 Peters, 341.
Eames v. *Godfrey*, 1 Wall. 78.
Case v. *Brown*, 2 Wall. 320.

Dunbar v. *Myers*, 94 U. S. 187.
Fuller v. *Yeutzer*, 94 U. S. 297.

The oblique discharge is stated in the patent to be necessary for a particular purpose; it is made a part of the claim for accomplishing that purpose. If others find that the patentee was working under a false and mistaken theory, that one element of the combination was not necessary, and they accomplished the result without it, they certainly do not infringe.

Fourth Error.

The court erred in finding damages for complainants, when it should have found that complainants had failed to prove any damages, or any measure of damages, or any definite number of infringing machines.

In the record is found (p. 26) the opinion of Judge Woods sustaining defendants' exceptions to the master's first report. On page 19 is found the master's second report, to which defendants excepted (p. 22). The first report found that complainants had an established license fee, and the number of infringing machines 1,600, equally divided between one and two-horse drills. The court held, on exception, that the complainants had no established license fee. He said, in his opinion (p. 26), nothing whatever about the exceptions to the report relating to the number of infringing machines, but concluded (p. 30):

> "Without further evidence the plaintiff is entitled to nominal damages; but that there may not be a failure of justice, the case is remanded to the master, with directions to admit further evidence by each party, if offered, and to report the same and his conclusions."

Under this order the complainant took no additional testimony as to the number of infringing machines, but called several witnesses to prove the value of the combination covered by the first claim of patent No. 30,685.

The master, thereupon, found in his second report (p. 19) an increase in the number of machines; and on the new evidence, proceeded to estimate the value of the invention covered by this first claim.

We will consider this report, first, as to the measure of damages; second, as to the number of machines.

Measure of Damages.

The complainants waived all claim to profits. No machines were ever made under the patents; they were never put upon the market (page 52, ans. 23; page 53, ans. 29-33.) The complainants had no established license fee (Judge Wood's opinion, pages 28 and 29, and evidence referred to). We admit, that under these circumstances, it is not an easy thing to prove damages, even if any were suffered. But the burden of proof is on the complainants. Damages are defined by this court as:

" What a patentee would have made if an infringer had not interfered with his rights." (*Seymour* v. *McCormick*, 16 How. 490.) " This is a question of fact, not a judgment of law." It must be proven, not guessed at. (*New York* v. *Ransom*, 23 How. 487.)

In order to show that a patentee would, in fact, have made a particular profit, if an infringer had not forestalled his sales, it is necessary to show that he would, but for that infringer, have made those sales; and to that end it is necessary to show that he could have supplied the articles wanted, and that the persons wanting those articles would have bought them of him had no infringer interfered. Where those facts are proven, the damages of the patentee will consist of the profits which he would have derived from the sales made by the infringer, if the patentee had made those sales; supplemented by the amount of whatever reduction of prices the patentee was compelled, by the defendant's competing infringement, to make even upon the goods which he did sell. (*Goodyear* v. *Bishop*, 2 Fisher, 161, 1861; *Magic Ruffle Co.* v. *Douglass*, 2 Fisher, 340, 1863; *Sargent* v. *Mfg. Co.* 17 Blatch. 247, 1879; *Fitch* v. *Bragg*, 16 Fed. Rep. 247, 1883.)

It was impossible for complainants to produce such evidence, for none existed. Perhaps in this emergency it was competent for them to offer evidence of the value of the invention to the defendants; but if so, the proof must be of the most satisfactory character.

New York v. *Ransom*, 23 How. 487.

"Proof must be specific and actual, not speculative. Actual damages must be proven not imagined."

Seymour v. *McCormick*, 16 How. 485.

Upon this point the complainants examined six witnesses, to wit: Thompson, p. 66; Westcott, p. 55; Lefevre, p. 62; Shearer, p. 77; Patrick, p. 42; Marley, p. 38.

The testimony of these witnesses is substantially the same, and is all subject to the same objection, *that it affords absolutely no measure of damages.*

Thompson testifies (p. 66):

"Q. 3. What are the advantages in a force feed grain drill of a space in the seed cup for the passage of the seed back of and under the seed wheel, *and* terminating in an oblique discharge orifice, when used in connection with a toothed or fluted seed-distributing cylinder? By a force feed I mean one in which the grain is carried through the seed cup by a wheel up to and over an elevated discharge orifice.

A. 3. The advantage is if there was no channel it would break or crack the grain, and a feed without the channel would be of little or no value. The advantage in an oblique discharge orifice is to get the benefit of two flutes at a time, and run the grain in a more continuous stream than with a straight orifice.

Q. 4. What would be the difference in price at which manufacturers could sell two-horse grain drills which delivered the seed evenly and uninjured, and others equally well made but which was liable to grind and bunch the seed and deliver it unevenly?

A. 4. There would be *no sale for a grain drill which would grind or crack the grain.*

Q. 5. Since the introduction of force feeds has there been any market for slide or gravity feeds within your experience?

A. 5. There has been but very little, if any.

Q. 6. Assuming that manufacturers had not the right to make grain drills having a passage around the distributing cylinder *and* an oblique discharge as before described, what, in your opinion, would be a reasonable and fair royalty or license fee per drill for the privilege of making and selling two-horse drills with such a feed?

A. 6. I should consider that five dollars would be a reasonable license.

Q. 7. Answer a similar question as to a one-horse drill.

A. 7. About two dollars and a half."

We call attention to the construction of the question and the understanding of it, by the witness. His answer relates to the comparative value of a machine without any passage for the grain at all, a machine totally useless and worthless, with one having a passage for the grain *and* an oblique discharge. Assuming that the oblique discharge *did no harm*, his answer would be the same. This witness is not a manufacturer, never read the patent (p. 70, a. 40); never saw a drill made like that described; had no experience in the matter of licenses (p. 68, a. 18), but bases his estimate at five dollars because that, in his opinion, "would be a fair recompense to the inventor" (p. 68, a. 15). "A manufacturer could pay that and sell the drill at a profit." Is this specific and actual proof of complainant's damages? A machine that will do its work well, is compared with one which has no value whatever, one that is absolutely worthless.

Shearer says: "The difference in the selling price would be fully as much as the price of the drill" (p. 73), which is undoubtedly true, "and a reasonable royalty therefore would be about five or six dollars" (a. 6). All the witnesses are asked the same question with substantially the same answer. Patrick thinks five dollars would be about a fair royalty, and yet he granted licenses at less than $4.75 which permitted his licensee to use all the claims in twenty different patents (pp. 43–44). And yet these witnesses are not to blame for these answers; indeed, the answers put the value, as based on their understanding of the questions, too small. They are deliberately led to assume that the question relates to the right to use a passage through the seed cup *and* an oblique discharge. Not such a passage *combined* with an oblique discharge. They are led to assume that the royalty covers not "the combination" but the privilege of making a useful and salable machine as compared with one absolutely useless and worthless. This evidence is of no value whatever. It is incumbent upon the complainants to offer specific and actual proof. They can not leave the measure of damages for the court to guess at.

Now, as against this evidence we have the only true measure of damages in such a case, to-wit: the market value. The same class of machines made by the defendants, with oblique discharge, were made by the Hoosier Drill Co., the Wayne Agricultural Co., and others.

J. W. Stoddard & Co., P. P. Mast & Co., The Farmers' Friend Co., made machines differing, in that they had no oblique discharge, but used a straight discharge orifice. (Pages 47, 51, 64, ans. 23–27, pp. 73 and 74).

All these drills sold for the same price. They sow the grain precisely as evenly, with or without the oblique discharge. (Testimony of Swope, p. 181; Fulghun, 51; Lawrence, 46; Marley, 38).

Mast & Co., who, in 1876, made a settlement with Westcott, under these patents, to avoid suit (p. 170), and received a license, never took the trouble to change his machines, but continued right on with the straight discharge.

The Farmers' Friend Co., and Stoddard, when the patents expired, never altered their machines, but sold them as they always had done, for the same price, with the straight discharge, that others had sold them with the oblique.

In 1880, the defendants changed from the oblique to the straight discharge on account of this suit (p. 164, ans. 86 and 87). Their principal agent, Mr. Reinstedler, although his attention was called to the change by letter, never actually noticed it until his testimony was being taken, two seasons later (p. 120). He continued to sell the drills after the change, exactly as before; neither he or his customers paid any attention whatever to the change. He says, (pp. 119–120):

> "Q. How long have you been engaged in the sale of grain drills and other agricultural machinery?
>
> [Objected by plaintiff as irrelevant.]
>
> A. Twenty years.
>
> Q. Are you familiar with the construction and operation of the various grain drills manufactured and sold in this section of the country?
>
> [Objected to by plaintiff as irrelevant, and not a proper cross-examination.]
>
> A. Yes, sir.
>
> Q. State whether you find any more difficulty in selling grain drills with the straight discharge, and the bearing at both ends of the cylinder, like Exhibit B No. 2, than those with the oblique discharge and short bearing, like B No. 1?
>
> [Objected to by plaintiff as being irrelevant, and as improper cross-examination, not being pertinent to the matters testified to in chief.]
>
> A. They sell equally as well, and for the same price.
>
> Q. Has either the oblique discharge, or the short bearing any advantage whatever in the market, over the straight discharge and double bearing?
>
> [Objected to for same reasons as last question.]
>
> A. I can see none.
>
> Q. Can you get any more money for the one, than from the other?
>
> [Objected to for same reasons as last question, by plaintiff.]
>
> A. No, sir."

The truth is, that it does not make the slightest difference whether the oblique discharge is used or not. The matter was fully tested. Fulghun says (p. 52):

> "Q. 17. Have you ever made any experiments to ascertain whether the grain will bunch when fed in such a device as has been described, without the oblique discharge?
>
> A. I have.
>
> Q. 18. How did you make the experiment, and what was the result?
>
> [Same objection.]

A. By feeding grain through cups with both kinds of discharges spoken of, oblique and straight, to see whether there would be a perceptive difference in the flow of the grain from the discharges, and I found by such experiments, that I was not able to distinguish any difference.

Q. 19. Were both these seeding devices on the same drill, and operated by the same shaft at the same time?

A. No; they were not, but were tested side by side.

Q. 20. If you covered up the seeding device, leaving the stream of grain visible, could you tell from the streams of grain which came from the oblique and which from the straight discharge?

A. I could not.

Q. 21. What, then, is the value of the oblique discharge, in combination with the fluted cylinder and passage around it, over the straight discharge?

[Same objection.]

A. Since making those experiments, my conclusions naturally were that it had no value over the straight discharge, although before making those experiments I had believed that it had a value."

(See also Lawrence, p. 48.)

The master himself says (pp. 20–21):

"Besides this, it appears that some of the so-called infringing machines did not use all the elements of the combination described under the first claim above mentioned. In some of them the 'oblique' discharge I was not used, but what is called a 'straight' discharge was substituted therefor."

To this it is answered that the "straight discharge" is the mechanical or practical equivalent of the "oblique discharge," and that the use of the conduit, "H," and the toothed cylinder, "C," in combination with the "straight discharge," is as much an infringement of complainants' claim as if the "oblique discharge" were used.

The merit claimed for the oblique discharge was that the grain was delivered from the discharge orifice in a steady flow, while the straight discharge would deliver it in bunches. Theoretically this seems to be so, but practically, and as shown by the tests made in the master's office and the experiments testified to by the witnesses, there seems to be very little, if any, difference in this respect.

Does this court award damages for the infringement of a patent based upon a theory demonstrated to be false?

The master, like the witnesses, assumes that if defendants use any of the elements of the claim, they infringe, and must pay, not for the use of the combination, but for a channel without which the machine would not work at all, whether that channel is combined as described in the claim or not.

Such a finding hardly needs comment before this court. (*Prouty* v. *Ruggles*, 16 Peters, 341; *Eames* v. *Godfrey*, 1 *Wal.* 78; *Case* v. *Brown*, 2 *Wal.* 320; *Fuller* v. *Yentzer*, 94 U. S. 297; *Water Meter Co.* v. *Desper*, 101 U. S. 332.)

Yet the master's blunders do not stop here. The witnesses testify that a fair royalty for a machine which is capable of working, as compared with one which wont work at all, would be about five dollars. This is all the evidence the master has; yet he fixes it at $1.50 per drill. He does not give a single reason; not a word of proof is referred to as a basis. It is simply a guess. The court, too, guesses. He finds the master has erred somewhere, but he does not say or intimate whether it is in the measure of damages or the number of machines. He simply arbitrarily reduces the gross finding by $450, and says:

> "In so far as the master's report is inconsistent with the foregoing order, the exceptions to said report are sustained, and in other respects said exceptions are overruled."

Are masters and courts governed by no rules of law?

The Number of Infringing Machines.

The master finds as follows (pp. 21, 22):

> "Besides this it appears that some of the so-called infringing machines did not use all the elements of the combination described under the first claim above mentioned. In some of them the 'oblique' discharge I was not used, but what is called a 'straight' discharge was substituted therefor. . . .

"It appears, by George Rude's evidence, that during the years 1870, 1874, 1875, 1878, 1879, 1880, and in 1881 (prior to May), defendants made and put on the market about 2,000 drills; if his outside figures were adopted the number would be larger. Squire Rude makes the number less. In my former report I used George Rude's evidence as to the contents of a written statement he had made, for a basis upon which to estimate the number of infringing machines. His deposition, outside of what he says about the written statement, shows a greater number than I then reported. I now report and find that the whole number made and sold by defendants, which infringed all three of the elements of the combination covered by the first claim, was 2,000, and that of these one-half were one-horse and one-half two-horse drills. The burning of defendant's factory, and the loss of their books, have made it impossible to get at the exact number."

The court will bear in mind that the testimony as to the number of infringing machines upon which the master bases this finding, is exactly the same as that upon which he based his findings in his first report. In his first report he included all machines which infringed any of the three claims held valid, viz: the first and second of patent No. 30,685, and the sixth of No. 31,819, one relating to the oblique discharge, one to the independent bearings of the cylinder, and one to the removable driving shaft. Some of the machines contained only one of the devices, to-wit, the removable driving shaft, some *only* the independent bearings, yet all were included in the 1,600 reported. His Honor, Judge Woods, says (page 27):

"As to the point made, that the evidence does not show how many of the machines made by defendants infringed one, and how many infringed both claims of plaintiff, the master is of the opinion that the terms of the license were the same in either case, and the same fee was charged whether one or more claims were infringed. . . .

In respect — two or more claims in a patent, each of value and distinct from the other, one can not equal all in value any more than in mathematics a part can equal the whole. The licensee may, if he choose, bind himself to pay the same price, whether he use the entire invention or a part only, but at the same time he acquires the right to use all, and so his agreement may not be unreasonable; but if, as against an infringer, such a license can have any force, reasonably, it must be in the way only of establishing a royalty for the entire invention. This view is in accordance with authority."

If, then, the total number which infringed any one of the three claims was 1,600, how can it be that the same evidence proves that the number infringing only one of the three claims is 2,000? How can this be explained? The master says (p. 21):

> "It appears by Geo. Rude's evidence that during the years 1870, '74, '75, '78, '79, '80, and '81 (prior to May), defendants made and put on the market about 2,000 drills; if his outside figures were adopted the number would be larger. Squire Rude makes the number less."

These two witnesses are the only ones who testified to the number of infringing drills. In his "first report" the master reported all that infringed any one of the three claims. Now let us look at George Rude's testimony, which relates to the larger number (p. 164, q. and a. 83--91):

> "Q. 83. How many five-hoed drills did you manufacture during the year 1880?
>
> A. I'd say from two hundred to three hundred and twenty-five. It is all a guess.
>
> Q. 84. How many eight-hoed drills did you manufacture during the year 1880?
>
> A. I'll have to make a guess at that; from seven hundred to a thousand.
>
> Q. 85. Did you manufacture any three-hoed drills during the year 1880? If so, how many?
>
> A. Yes; that is a guess; I'll say about twenty-five. I think they were all returned at least once.
>
> Q. 86. How many of the drills manufactured that year had feeding devices like Exhibit A 1?
>
> A. I ain't positive that there was any of them. We changed the patterns during that year to make the dis-

charge orifice straight instead of round, but the hole through the cylinder remained unchanged.

Q. 87. Then the feeding devices upon the five-hoed drills manufactured by you during the year 1880 were like Exhibit A 1, with the exception of the change in the discharge orifice of which you have spoken?

[Objected to as leading.]

A. Yes.

Q. 88. You say you changed the discharge orifice by making it straight in the year 1880? Give your best impression as to the exact time during the year when the change was made.

A. I think it was some time in July—may be the first of August.

Q. 89. Did you make any other change in the feeding device of the five-hoed drills in that year, except that above mentioned?

A. Not as I know of; none made that I know of.

Q. 90. I wish you would describe particularly the change which you made in the discharge orifice?

A. I have answered that, I guess; we just cut it straight across the bottom.

Q. 91. How many of the drills manufactured in that year had feeding devices like Exhibit B 1?

[Question objected to, as Exhibit B 1 has never been held by the court to be an infringement of the letters patent sued on.]

A. All of the eight-hoed, I think."

Here we find in a single year from 200 to 325 (five-hoed) drills of the 1,600 reported in the first report which contained the short bearing and infringed the second claim, did not have the oblique discharge, and therefore go to reduce the number, not to increase it. The number 1,600 has been increased "*by subtraction.*" Again the master found in his report 1,600 drills equally divided between one and two-horse machines. The eight-hoed machines were two-horse and all the others one-horse drills. In this same year, 1880, there were made from 200 to 325 five-hoed or one-horse machines; 25 three-hoed or one-horse machines; 700 to 1,000 eight-hoed or two-horse machines, or at the outside, 350 one-horse, and 1,000 two-horse.

Yet, we find the master not only increasing the total number from 1,600 to 2,000, by his peculiar system of subtraction, but, marvelous as it may seem, one-half was still one-horse, and one-half two-horse drills. We submit this is too much.

In estimating the number of machines which used this feature, the master says (p. 21):

> "In my former report, I used George Rude's evidence as to the contents of a written statement he had made, for a basis to estimate the number of infringing machines."

This statement was made before the accounting, as a step in negotiations for a compromise. The statement is not in evidence; its absence is not accounted for or explained. It was a statement of the total number of drills made, without regard to the number infringing this claim or any other. The evidence was objected to (pp. 157 and 158).

We find it difficult to imagine a more concentrated accumulation of errors than the admission of such evidence, and the basing of a report upon it.

If the master wants to guess, let his guesses be within at least reasonable probability, and based on some shadow of proof.

The fact is simply this, the master had made up his mind to find for the complainants, and he must do so *ruat coelum*.

We therefore submit:

First. The bill should have been dismissed for misjoinder of parties complainant.

Second. The first claim of patent No. 30,685, is invalid, unless limited to the combination described. If so limited, it is not infringed.

Third. The complainants have failed to produce actual proof either of the number of machines, or a measure of damages.

If the second or third points are found for appellants, the decree below must be reversed as to the account, with nominal damages, and all costs of accounting and appeal for appellant.

Respectfully submitted,

L. HILL,
ARTHUR STEM,
Counsel for Appellants.

Office Supreme Court U.S.
FILED.
JAN 28 1889
JAMES H. McKENNEY,
CLERK

United States Supreme Court,

OCTOBER TERM, 1888,

No. 187.

SQUIRE B. RUDE, ET AL, Appellants,
vs.
JOHN M. WESTCOTT, ET AL, Appellees.

BRIEF FOR APPELLEES.

E. E. WOOD and
EDWARD BOYD,
COUNSEL FOR APPELLEES.

C. Souer & Co., Printers, Cincinnati.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888,

No. 187.

Squire B. Rude and Henry Husted and Americus E. Johnson, Administrators of George W. Rude, deceased, and William M. Snyder, Executor of John R. Rude, deceased, defendants by Revivor, Appellants, *vs.*

John M. Westcott and Henry Lewis and John T. West and Edward A. Ferguson, Executors of Charles W. West, deceased, complainants by Revivor, Appellees.

BRIEF FOR APPELLEES.

STATEMENT.

This is an appeal from the Circuit Court of the United States for the District of Indiana, in which court John M. Westcott and Charles W. West filed their bill of complaint March 10, 1876, against Squire B. Rude, George W. Rude and John R. Rude, for an injunction and damages on account of the infringement by them of two letters patent of the United States, issued to Hiram Moore, for improvements in grain drills, being No. 30,685, dated Nov. 20, 1860, and extended for seven years from Nov. 20, 1874, and No. 31,819, dated March 26, 1861. (Rec. 1.)

The original answer (p. 7), filed May 1, 1876, denied infringement, and set up a number of patents and uses as anticipatory of the patent sued on, but no evidence of any of these was offered. By an amended answer filed Feb. 28, 1881, the assignment of certain interests in the Moore patents is set up, with the allegation that the complainants had not sufficient title to enable them to maintain their suit. (Rec. 11.)

In May, 1881, the case was heard by Judge Gresham who in an oral opinion decided "that the title to said letters patent, respectively, is duly vested in the complainants," and that the defendant had infringed the first and second claims of the 1860 patent, and the sixth claim of that of 1861, as appears by the interlocutory decree, p. 12, whereby it is referred to W. P. Fishback, Esq., to take the account.

On Dec. 6, 1881, the Master filed his report, based on an established license fee; exceptions to which by the defendants were sustained by Judge Woods, who remanded the case to the Master for further evidence and report. (Rec. 26, 30.)

The Master filed a second report April 23, 1885, (Rec. 19,) to which exceptions were filed by the defendants (Rec. 22), and overruled by Judge Woods, in an oral opinion, except in so far as the amount of damages decreed, $1800 (Rec. 26), is less than the Master reported, $2,250. (Rec. 22.)

During the pendency of the suit, one of the complainants, Mr. West, and two of the defendants died, and the suit was duly revived. (Rec. 26.)

From the final decree the defendants appealed, and we suppose the only questions for review will be as to the title of the complainants, infringement and the correctness of the damages found.

In the court below, while infringement was not admitted at the hearing, it was so obvious that there was very little controversy on the subject.

The real controversy was on the question of defect of title or of parties, and as this question depends entirely on the construction of two agreements printed in the record at pages 89, 96, 97, for convenience we will reprint them here:

CONTRACT BETWEEN MOORE, WESTCOTT AND WEST.

"This agreement, made this sixth day of October, *Anno Domini* one thousand eight hundred and seventy-four, by and between Hiram Moore, residing near Ripon, in the County of Fond du Lac, and State of Wisconsin, party hereto of the first part, Charles W. West, of Cincinnati, in the County of Hamilton, and State of Ohio, party hereto of the secoud part, and John M. Westcott, of Milton, in the County of Wayne, and State of Indiana, party hereto of the third part, witnesseth,

"That whereas, sundry letters patent of the United States heretofore have been granted to said Moore, which said letters patent are respectively numbered, entitled, and dated as follows, to-wit: No. 30,685, dated Nov. 20th, 1860, and entitled, 'Improvement in Seed Drills,' and No. 31,819, dated March 26th, 1861, and entitled, 'Improvement in Seed Drills,' and whereas, the said Moore is justly indebted unto the said Charles W. West in the full sum of ten thousand dollars, for money advanced to aid him, the said Moore, in perfecting his inventions, and is desirous of securing the repayment of the same, and whereas, the said Westcott is desirous of acquiring an interest in the inventions and letters patent aforesaid, and in any re-issue, renewal or extension thereof; now, therefore,

"Know all men by these presents, that, for and in consideration of the premises, and of the sum of five dollars in lawful money, to me in hand, by the said Westcott and West, before the execution hereof, paid, and of other valuable considerations, me thereunto moving, I, the said Hiram Moore, do hereby assign, sell and set over unto the said Charles W. West, and John M. Westcott, the entire right, title and interest in and to the letters patent aforesaid, and in and to the inventions and improvements represented, shown, or described therein, including any renewal, reissue or extension thereof, the same to be held and enjoyed by the said West and Westcott, and their legal representatives, as fully and entirely as the same would have been held and enjoyed by me had this assignment and sale not been made, to the full end of any term or terms for which the letters patent aforesaid, or either of them, have been, or hereafter may be, granted, reissued, renewed, or extended.

"I hereby further agree to sign such lawful papers, and do such lawful acts as may, by the counsel, learned in law, of the said West and Westcott, be deemed necessary or expedient, in order to obtain an extension or reissue of the patents aforesaid, or to assert, maintain, or defend the rights secured by said letters patent. It is expressly understood, however, that the costs and charges of the proceedings aforesaid shall be defrayed by said West and Westcott, as hereinafter provided.

"In consideration of the premises, I hereby further make constitute and appoint the said Charles W. West and John M. Westcott my true and lawful attorneys in law, and, in fact, with power irrevocable, giving and granting to them full and exclusive and unreserved power and authority, for me, and in my name, place and stead, to assume and take upon themselves the entire and exclusive management and control of the aforesaid letters patent, and of each and every one of them, and to dispose of all the rights, title and interest which I have under the same, and under each and every of them, for such price or prices, upon such terms, and to such persons, and for such place or places, as they, my said attorneys, shall deem proper, and in my name, place and stead, and as my own proper act and deed, to sign, seal, deliver and acknowledge all such deeds and instruments of writing as shall be necessary or proper for the granting or licensing to others the said rights under the said letters patent, and to each and every of them, and to ask, demand, sue for and receive the price or fees, or any part or parts thereof, paid or payable for such grants or licenses, and in my name to execute and deliver receipts and acquittances therefor, and in my name to bring to account and reckoning, and to ask, demand, sue for, and recover and receive of and from all and any person whomsoever who may have been, or may be, manufacturing or selling said drills containing the improvements aforesaid, or by any or either of them, such reasonable price or fee for such use of said improvements, or either of them, as my said attorneys shall deem proper and reasonable, and on receipt or recovery thereof, or of any part or parts thereof, to execute in my name such good and sufficient receipts, releases and discharges for the same as my said attorneys shall deem proper, and to liquidate and discharge the same; and on the neglect or refusal of any such manufacturer or manufacturers, as aforesaid, lawfully to account for the use of said improvements, or of any or either of them, and to pay such reasonable price or fee for such use, and to agree to pay a reasonable royalty therefor, or for the right to continue the use of said improvements, or of any or either of them, to take all such legal ways and means for securing and enforcing the payment thereof, or to stop the unauthorized use of such improvements, or any or either of them, by action, suit or otherwise, as they, my said attorneys, may deem expedient, and in my name to prosecute, as they may deem expedient, all or any actions or suits at law or in equity, or other proceedings, before any tribunal, against any person or persons, brought by or under my said attorneys, and thereon to proceed to judgment, or to discontinue, or to compromise the same, as they, my said attorneys, shall deem expedient, hereby authorizing and empowering my said attorneys to substitute and appoint, under themselves, one or more special attorneys, to do or perform any act, matter or thing which they themselves might lawfully do by virtue hereof, and generally to do and perform, and execute in my name, as aforesaid, all and whatever other acts, matters and things that they may deem expedient and requisite, or may be advised to do in and about the premises, as fully and effectually, to all intents and purposes, as if I myself were present and did the same, I, the said Hiram Moore, hereby ratifying, allowing and confirming, and agreeing from time to time, and all times hereafter, to ratify, allow and confirm as good and valid all and whatsoever the acts, matters and things which my said attorneys, or their substitute, shall lawfully do, or cause to be done, in and about the premises, by virtue of these presents; and I, the said Hiram Moore, hereby covenant and agree with the said West and Westcott to do no act or thing to diminish the powers herein conferred upon them, or to hinder or embarrass them in the execution of this power, which is hereby intended and declared to be irrevocable. I hereby revoke, annul,and disallow any and all powers of attorney heretofore given by me in this behalf. It is hereby agreed by and between the parties hereto, that this agreement is to supercede and take the place of any heretofore made between said Moore and J. M. Westcott aforesaid, and that the entire right, title and interest in the letters patent aforesaid has been, up to the execution of these instruments, vested in the said Hiram Moore.

"The said John M. Westcott, for his part, agrees, at his own cost and charges, to procure the extension of said letters patent, Nov. 20, 1860, now pending, if practicable, including the expenses already incurred, as well as those which hereafter may be incurred in said behalf, which sum is to be paid absolutely, whether said extension is granted or not, and in no event is any part of said sum to be reclaimed from, or refunded or repaid by said Moore, or to be deducted from the sum or sums collected under said patents.

"It is hereby covenanted and agreed, by and between the parties hereto, as follows: That from the sum or sums collected under the letters patent aforesaid, from sales, royalties, or settlements, or from any other source, shall first be deducted the costs, charges and expenses of collecting the same, including all litigation expenses, save those of the extension application, and then the net profits or receipts shall be divided among the parties hereto as follows: To Hiram Moore, or his legal representatives, one-fourth part; to C. W. West, or his legal representatives, one-fourth part; to John M. Westcott, or his legal representatives, one-half part. In case of loss or failure to realize any profit under said patents, all litigation expenses aforesaid are to be paid by said Westcott, it being expressly understood by the parties hereto that under no circumstances are said Moore or West to incur any obligation, or be under any liabilities for said expenses. It is further agreed that John M. Westcott is to make no charge for his own time spent in this behalf, nor is said West to make any charges for his services.

"It is also expressly understood that said Moore's interest is to continue during and throughout the extended time of the patent of November 20, 1860. Should such extension be granted, the parsies hereto hereby agree in good faith to perform the covenants between them made.

"In testimony whereof the parties hereto have affixed their hands and seals, the day and year first above written.

"In presence of HIRAM MOORE,
"Wm. D. Baldwin, C. W. WEST, {SEAL}
"Mary T. Palmer. J. M. WESTCOTT.

"State of Wisconsin,
"County of Fond du Lac, } *ss.*

"At Ripon, in said County, before me personally came, this seventh day of Oct., A. D. 1874, the above named Hiram Moore, and acknowledged the foregoing instrument to be his act and deed, to the intent and for the purpose therein set forth.

"In testimony whereof I hereunto subscribe my name and affix my notarial seal, this seventh day of Oct., A. D. 1874.

"J. J. FOOTE,
"*Notary Public, Wisconsin.*"

CONTRACT BETWEEN WESTCOTT, MORRIS AND KINSEY.

"Whereas, heretofore, to-wit, October 6th, 1874, Hiram Moore, of Fond du Lac County, Wisconsin, Charles W. West, of Cincinnati, Ohio, and John M. Westcott, of Milton, Indiana, entered into a contract and article of agreement in relation to certain improvements in grain drills, for which letters patent have been issued to said Moore. No. 30,685, dated Nov. 20th, 1860, and No. 31,819, dated March 26th, 1861, in which agreement, amongst other things, the said Moore assigns and conveys to said West one-fourth, and to said Westcott one-half, and retains for himself one-fourth of said interest, contained in said letters patent, for said improvements in said grain or feed drills.

"In said assignment, said Westcott, on his part agrees, at his own cost and charges, to procure the extension of said letters patent of Nov. 20th, 1860, including expenses already incurred, as well as those that may hereafter occur in said behalf, to be paid whether such extension be granted or not, and in no event is said sum, or any part thereof, to be reclaimed from or refunded by said Moore, and that from sums collected under said letters patent, from sales, royalties or settlements, or from any other source, shall first be deducted the costs, charges and expenses of collecting the same, including all litigation expenses, save those of the extension application, and then the net profits, or receipts, shall be divided among said parties; to said Moore one-fourth, said West one-fourth, and said Westcott one-half part. In case of loss or failure to realize any profits under said patent, all litigation expenses aforesaid are to be paid by said Westcott, said Moore or West to be under no liabilities for said expenses. Said Westcott is to make no charge for his own time spent in this behalf, nor is said West to make any charge for his services; said Moore's interest is to continue during and throughout the extended term of the patent of Nov. 20th, 1860, should such extension be granted.

"And, whereas, in consideration of the foregoing, Isaac Kinsey and Aaron Morris, of Milton, in Wayne County, Indiana, are desirous of obtaining an interest in said letters patent, they thereby agree to and with said John M. Westcott, of the same place, to severallly take an equal interest with him in the same.

"Therefore, this Article of Agreement witnesseth: That said John M. Westcott hereby agrees to and with said Isaac Kinsey and Aaron Morris, and does hereby set over and assign to each of them one-third part of his one-half interest, retaining one-third part himself in said letters patent; and said Kinsey and Morris, fully understanding the original agreement mentioned, do hereby agree to and with said Westcott, to be at one-third expense each with said Westcott, jointly, as set forth in said agreement, and shall be equally entitled and receive one-third profit or proceeds, if any, in said one-half interest, and in all things pertaining hereto to be governed by this and the original contract and agreement.

"In witness whereof, we have hereunto set our hands and affixed our seals, this 10th day of November, 1874.

"J. M. WESTCOTT. [Seal.]
"ISAAC KINSEY. [Seal.]
"AARON MORRIS." [Seal,]

POINTS.

I. The bill does not describe the character in which the complainants sue, but it does refer to and make profert of the agreement above set forth of Oct. 6, 1874, as evidence of their right to maintain the suit, and we suppose there can be no question but that the title of the complainants, and the capacity in which they sue, are to be ascertained from that instrument in the same way as if the bill had specially alleged them.

II. It was admitted by the defendants in the court below that the agreement of Oct. 6th vested in West and Westcott the entire legal title to said patents, in trust, for the benefit of themselves and Moore,—but it was claimed that by the agreement they became vested with legal and equitable estates, and that by operation of law the equitable merged in the legal; and that, therefore, Westcott became vested with an absolute estate, assignable by him alone; that he made the agreement of Nov. 10th, secondly above set forth, and that, therefore, Kinsey and Morris were necessary parties to the suit. It was also claimed that Moore was a necessary party.

Whether or not they are necessary parties depends on the construction to be given to the agreement.

In a suit by West and Westcott against The Wayne Agricultural Works, in which the only question depended on the construction of these agreements, it was held by Judge Gresham that Moore, Kinsey and Morris were not necessary parties to a bill for infringement of the patents. (11 Fed. Rep. 298.)

III. Unless Westcott had an absolute estate in the patent, which he could assign without the consent of his co-trustee, it will not be claimed, we think, that Kinsey and Morris took any legal title to the patents by the agreement of Nov. 10th, and it was only claimed that Westcott acquired such an assignable interest by virtue of the doctrine of merger.

The question then would seem to be reduced down to a construction of the agreement of Oct. 6th, and the application of the doctrine of merger to it.

> "Merger is not favored in equity, and is never allowed, unless for special reasons, and to promote the intention of the party." (4 Kent 102; Loomer vs. Wheelwright, 3 Sandf. Ch. R. 186.)

IV. CONSTRUCTION OF AGREEMENT OF OCT. 6TH. The meaning of the contract is a question of law, to be determined by the court (2 Par. Con. 492), and "the object aimed at in construing a contract is, to discover and give effect to the intentions of the parties." (Chitty on Con. 78; 10 Am. Ed.)

> "To ascertain the intent of the parties is the fundamental rule in the construction of agreements. When the substantial thing which they have in view can be gathered from the whole instrument, it will control mere formal provisions, which are intended only as a means of attaining the substance." (Canal Co. vs. Hill, 15 Wall. 94.)

The legal meaning of the contract of Oct. 6th is not clear. There is an inconsistency in its terms that renders it ambiguous and uncertain; therefore, the Court will resort to construction, in order to determine its legal effect. In doing this, the Court will seek the intention of the parties in making the contract, and not having clearly expressed this intention in the words used, the Court will consider, if necessary, the nature of the instrument, the condition of the parties, the subject of the contract, and the object in making it. Moran vs. Prather, 23 Wal., 492,501.

Another cardinal rule of construction, and one of great importance in this case, when applied to the contract in question, is this: For the purpose of construction the Court will consider the entire instrument, and will reconcile its various parts, in order to accomplish the design and intention of the parties thereto. In order to arrive at the intention of the parties, each part of the instrument will be viewed in the light of the other parts. Stout vs. Whinney, 12 Ill., 219. "Many cases are given in the books in which the plain intent has prevailed over the strict letter of the contract." 2 Kent Coms., 555. "If the purpose is more clear and certain in some parts than in others, those which are obscure may be illustrated by the light of others. 2 Par. Con., 502.

Recurring now to the contract between Moore, West and Westcott, we desire to examine it somewhat in detail, for the construction given this contract, will, in a great measure, determine the legal effect of the other, and fix the rights of the parties in the premises. Keeping in view the fact, that the primary object of construction is to ascertain the intention of the parties in making the contract, and that for this purpose we are to consider the instrument in all its parts, in order to determine the manifest intent and legal effect of the whole, a construction can be given that will be consistent, and one that will effectuate the evident design and object of the parties.

After the recital in the contract, that Hiram Moore was the owner of the letters patent described, and that he was indebted to Charles W. West in the sum of $10,000, and that he was desirous of securing said West in the payment of such indebtedness, and that said Westcott was desirous of obtaining an interest in said letters patent, Hiram Moore, "in consideration of the premises, and of the sum of five dollars," makes the following assignment:

> "I, the said Hiram Moore, do hereby assign, sell and set over unto the said Charles W. West and John M. Westcott the entire right, title and interest in and to the letters patent aforesaid, and in and to the inventions and improvements represented, shown and described therein, including any renewal, re-issue or extension thereof, the same to be held and enjoyed by the said West and Westcott, and their legal representatives, as fully and entirely as the same would have been held and enjoyed by me had this assignment not been made, to the full end of any term or terms for which the letters patent aforesaid, or either of them, have been, or herafter may be, granted, renewed or extended."

This part of the contract, standing alone, would certainly be clear and explicit. The effect of it would be to vest an absolute and unconditional title to the letters patent in West and Westcott, and Moore would retain *no interest* whatever therein. That it was not the *intention* that Moore should be deprived of *all interest* in the letters patent absolutely, appears from the subsequent portions of the contract. That it was his intention to vest the legal title of said letters patent in West and Westcott, is equally clear. But the vesting of such title was simply to enable them to more easily carry out the object and purpose the parties had in view in the execution of the contract.

If parties, in the execution of a contract or deed, use words importing an absolute and unconditional conveyance of property, and then, in a subsequent clause of the contract or deed, use qualifying words, or attach a condition to the grant or conveyance, the whole will be construed together, and the latter clause will operate as a limitation upon the former. Bonds or obligations executed to secure the performance of a duty or contract are familiar examples in point. So with mortgages to secure the payment of an indebtedness. Even a deed, absolute on its face and with full covenants, may be modified and converted into a mortgage by a *verbal* condition. Babcock vs. Wyman, 19 How., 289,-299. A general conveyance may be limited by restrictive words contained in the same instrument. People vs. Gasper, 3 Neb., 309; Wiggins vs. Wasgatt, 34 Me., 308.

It being unquestionably the law that the above mentioned clause of conveyance, though absolute in terms, may be modified or restricted by subsequent conditions in the contract, it remains for us to inquire if the parties did, in fact, engraft any conditions in the contract that operate as a limitation upon such conveyance.

By the next provision in the contract Hiram Moore agreed "to sign such lawful papers and do such lawful acts" as West and Westcott, or their attorneys, should deem necessary to obtain a reissue of the patents, requiring, however, that he should bear none of the expenses. This clause in no wise conflicts with the one above mentioned, therefore, it is unimportant, as far as this argument is concerned.

The next clause is lengthy and "peculiar," to say the least of it. The party who drew the contract may have had a very clear conception of what he desired to do, but he was unfortunate in his manner of expressing it. In this clause of the contract Moore appoints and constitutes West and Westcott his "true and lawful attorneys in law, and, in fact, with power irrevocable, * * * to take upon themselves the entire and exclusive management of the aforesaid letters patent." He clothes them with power to execute deeds and instruments in his name, to make collections, and to "execute and deliver receipts and acquittances therefor." He authorizes them as his attorneys "to ask, sue for, and recover, and receive of, and from, all and any persons whomsoever, who may have been, or may be, manufacturing or selling said drill containing the improvements aforesaid." He intrusts everything to their discretion, and agrees that "he will do no act or thing to diminish the power hereby conferred upon them, or to harass or embarass them in the execution of this power, which is hereby intended and declared to be irrevocable."

That part of the clause which confers upon West and Westcott the power to collect damages from parties who had infringed the patents, prior to the time of the execution of the contract, was proper and necessary to authorize them to act in the premises, but all that part conferring power upon them to execute "deeds and instruments of writing," in the name of Moore, after the legal title of the letters patent had passed, by virtue of the contract, conferred no power whatever that did not pass as an incident to the grant of the title. The authority to use the name of Moore implied nothing. His name was unnecessary and improper to "deeds and instruments of writing" concerning said letters patent. Such "deeds and instruments" would require the signature of West and Westcott, and this they were authorized to use, by virtue of their contract, without the aid of "a power of attorney." It was evidently the intention of Moore to clothe West and Westcott with the power to execute "proper deeds and instruments of writing," in order to carry out the object and purpose of the contract. He no doubt overlooked the fact that they possessed this power, by virtue of the legal title being vested in them. The The Court will, therefore, be authorized to treat the portions of the contract in question as surplusage.

> "If the parties expressly provided not anything different, but the very same thing, the law would have implied, now this provision may be regarded as made twice, by the parties and by the law. And as one of these is surplusage, that made by the parties is deemed to be so, and hence is derived another rule of construction, namely, that the expression of these things which the law implies works nothing." 2 Par. Con., 515.

While it is true that all that part of the contract conferring powers upon West and Westcott, with the exception noticed, may have been unnecessary, yet it serves the very useful purpose of plainly indicating the *intention* of the parties, and the *object* and *purpose* of the contract, and this object and purpose should be considered for the purpose of construction. Bickford vs. Cooper, 41 Penn. St., 146; Thomas vs. Wiggins, 41 Ill., 478; Brown vs. Slater, 16 Conn., 196; Toule vs. Bigelow, 10 Mass., 379; Phelps vs. Bostwick, 22 Barb., 318; Pollard vs. Mattox, 18 Ala., 321; Price's Heirs vs. Evans, 26 Mo., 49.

We come now to a portion of the contract, which plainly indexes the intention of the parties thereto, and explains the relation they expected to bear to each other after the execution thereof. We refer to that portion of the contract which reads as follows:

> "It is hereby covenanted and agreed by and between the parties hereto as follows: That from the sum, or sums, collected under the letters patent aforesaid, from sales, or royalties, or settlements, or from any other source, shall be first deducted the costs, charges and expenses of collecting the same, including all litigation expenses, save those of the extension application, and then the net profits or receipts shall be divided among the parties thereto as follows: To Hiram Moore, or his legal representatives, one-fourth part; to C. W. West, or his legal representatives, one-fourth part; to John M. Westcott, or his legal representatives, one-half part."

Here we have the key to the *object* of the parties in entering into the contract. That object was the realization of profits out of the letters patent for their mutual benefit. The relation established between the parties, was, in many respects, in the nature of a partnership. Moore contributed the letters patent; Westcott and West were to control and conduct the business, and to enable them to do so without hindrance, the legal title was vested in them. Moore contributed the patents, and was to receive one-fourth of the net profits; West had contributed $10,000 to aid Moore in perfecting his inventions and obtaining his patents, and he was to receive one-fourth of the net proceeds; Westcott did not contribute anything, but he obligated himself to pay all expense if no profit was realized, in consideration of which he was to receive one-half of the net proceeds. If an income resulted from the business, then all were to contribute to the expenses in proportion to their respective interests in the net proceeds, for the contract provides that from the gross receipts the "cost, charges and expenses" should be deducted, and then the "net profits or receipts" should be divided, as above stated.

There are some features, however, contained in the agreement in question that do not characterize an ordinary contract of partnership. The legal title of the letters was vested in two of the parties, and they were given the absolute control of the business. The other party was to have no voice in the management,—was not even to be consulted,—nor was he to share any loss. He had no authority to make any contract in the premises; he remained wholly passive. If a net profit resulted, he received one-fourth of it—this was all. It was, however, evidently understood by the parties that he retained some kind of an interest in the *subject* of the contract, for in the concluding clause the following statement is made: "It is expressly understood that *said Moore's interest is to continue during and throughout the extended term of the patent of Nov. 20, 1860.*" This was the patent, of which Westcott was to procure a renewal at his own expense, and the period through which it was stipulated Moore's interest was to extend, embraced the entire life of the patent.

Taking the contract as a whole, interpreting each part in the light of the others, and considering the subject of it, we think the following construction can be adopted, which will give it an operation in entire harmony with the obvious intention of the parties thereto. Moore conveyed the legal title of the letters patent to

West and Westcott, in *trust* for them all, *jointly*, intending to clothe them with full power, to manage, control and dispose of the monopolies for the purpose of producing an income for his and their joint benefit. That he did not intend to convey to them the unconditional title, legal and equitable, in said patents, is manifest by his reservation of an *interest* therein, as above stated. If the said trustee disposed of the legal title of the patents for the purposes set forth in the contract, Moore's interest was transferred and impressed upon the proceeds; and if, after the expenses were paid, a net fund was produced, the trust was at an end, and each one was to receive his share, divested of the interest of the others. This was the ultimate object of the trust. Strictly speaking, the trust was terminated as soon as the gross proceeds were produced, for it is expressly provided, that "from the sum, or sums, collected" the *parties* should deduct "the costs, charges and expenses," and then divide the residue in the proportions mentioned. This would convert the proceeds into a partnership fund. "A partnership in profits may exist, without including title to the stock, out of which such profits arise, if such be the agreement of the parties." Moore vs. Farnham, 7 Hun., 425; Story on Part., 7 Ed., 27, § 27.

If we are correct in assuming, that when West and Westcott took the legal title to the letters patent, they took it as trustees, for the purposes above stated, it is important to ascertain the extent of the power conferred upon them by the terms of the contract. Was there any limitation upon their power to alienate the title vested in them? "The extent of the legal interest of a trustee in an estate given him in trust is measured by the object and extent of the trust upon which the estate is given." Perry on Trusts, § 312. See, also, 3 Redf. Wills, 534; Cleveland vs. Hallett, 6 Cush., 407; Gould vs. Lamb; 11 Met., 84; Brooks vs. Jones, id., 191; Fisher vs. Field, 10 John., 495; Brewster vs. Striker, 1 E. D. Smith, 321. "But the estate in a trustee will be so construed as not to be greater than is required for the due execution of the trust." 3 Red. Wills, 535.

There can be no question but that it was the intention to confer upon West and Westcott full power to make grants of, or issue license under, the patents, for the purpose of realizing a profit. The power was conferred upon them jointly, and, reposing confidence in their ability, honesty and integrity, he entrusted everything to their judgment and discretion. They were selected and named in the instrument conferring the power. "A power of sale, whether a common law or equitable power, or taking effect under the statute of uses, can be executed only by the persons to whom it is expressly given." Perry on Trusts, 447; 3 Red. Wills, 547; 3 Williams Ex., 1018. A power conferred upon a trustee, "being of a strictly personal and fiduciary character," cannot be delegated. 3 Red. Wills, 547. If a power is conferred upon two or more trustees, jointly, with discretion to act, all must concur in the execution of the power, or else their acts will be invalid. "If a power of sale, or any other power, is given to two or more persons by name, with no words of survivorship, and one dies, or refuses to act, the others cannot execute the power." Perry on Trusts, 447. See, also, Shelton vs. Horner, 5 Met., 465; Floyd vs.

Johnson, 2 Litt. (Ky.), 109; Chandler vs. Rider, 102 Mass., 465. "If a power is given, indicating personal confidence, it must be confined to the individual, or individuals, to whom it is given, and will not, except by express words, pass to others than the trustees originally named." Tainter vs. Clark, 13 Cush., 226. See Fontain vs. Rarenel, 17 How., 538; Ross vs. Barclay, 18 Penn., 184; Perry on Trusts, 448.

The law is clear that if two or more persons are *named* as trustees, and the instrument creating the trust discloses the fact that confidence was reposed in the persons named, and a discretion given, such trustees must act *jointly*. "Where several are named as trustees, they constitute, together, but one trustee, and must execute the trust together, in order to act at all, the act of one having no effect. A sale, therefore, by one of the trustees would be void, since trustees cannot act separately, unless the authority be to them, or either of them. 2 Wash. Real Prop., 484; Wilber vs. Almy, 12 How., 180,-191. See, also, Sinclair vs. Jackson, 8 Cow., 543; Franklin vs. Osgood, 14 Johns., 527; Ridgley vs. Johnson, 11 Barb., 527; Cox vs. Walker, 26 Me., 504; Vandever's Appeal, 8 W. & S., 405; Hill vs. Joselyn, 13 Sm. & M., 597; Chamless vs. Minchin, 7 Ves., 198; Ex-parte Rigley, 19 Ves., 463. Where the property is vested "in several co-trustees, they all form, as it were, one collective trustee; therefore, they must perform their duty in their joint capacity." Perry on Trusts, § 411. "A deed of land executed by one trustee does not convey his share, as in the case of ordinary joint tenants." Id., § 412.

In regard to the execution of a power conferred upon two or more trustees, a distinction is drawn between a *naked power* and a *power coupled with an interest.* In the former case the right to execute the trusts will not survive, in case of death or disability of one of the trustees; in the latter it is different, and the survivors may execute the trust. Franklin vs. Osgood, 14 Johns., 562; Sinclair vs. Johnson, 8 Cow., 554; Hunt vs. Rousmanier's Admr., 8 Wheat., 383; Peter vs. Beverly, 10 Pet., 564; Osgood vs. Franklin, 2 Johns., Ch. 20; Gray vs. Lynch, 8 Gill, 413; Williams vs. Otery, 8 Humph., 363. When a deed was executed by two of three trustees, the burden was put upon the purchasers to prove that the other trustee was dead. Ridgeley vs. Johnson, 11 Barb., 527. The distinction in this case, however, is unimportant, for in either event, if the trustees are living, all must join. Sinclair vs. Johnson, 8 Cow., 554. In this last case Savage Ch. J. said: "In the event of the death of one, the power to execute the trust survives, but I find no authority to support a conveyance made by a part of the trustees during their joint lives, unless a provision is made for the majority to act."

A power, given by a letter of attorney, "coupled with an interest, survives the donor, and is not revocable by him who creates it during his life-time." 2 Wash. Real Prop., 616, (3d ed.) The donee executes it in his own name, independent of the existence of the donor. Id. See, also, Hunt vs. Rousmanier's Admr., 8 Wheat., 383; Wilson vs. Troup, 2 Cow., 234.

As to what constitutes "a power coupled with an interest," see Hunt vs. Rousmanier's Admr.; also, 2 Wash. Real Prop., 617. The case at bar comes squarely within the rule.

The terms of the contract manifest that Moore reposed great confidence in West and Westcott. He entrusted them, *jointly*, with the disposition of his property at their discretion. This would confer no power upon Westcott to act alone, especially if his act would tend to defeat the trust, and of this all persons would be bound to take notice, as the contract was duly recorded, as prescribed by law. When they had disposed of the monopolies for the *purpose of realizing profits*, and the proceeds thereof came into their hands, the power granted was exhausted, and the trust was terminated. The fund thus created became a partnership fund, in which all were to share as principals. The terms of the contract in regard to the disposition of this fund were mandatory, the rights of the parties therein were fixed, and nothing was left to the judgment and discretion of West and Westcott.

CONSTRUCTION OF THE AGREEMENT BETWEEN WESTCOTT, KINSEY AND MORRIS.

We now invite the attention of the Court to the contract of Westcott with Morris and Kinsey. To this contract Moore and West were not parties. There is nothing to show that they consented to, or had knowledge of, its execution. They are in no wise bound by its terms.

The contract begins with a recital of the existence of the contract entered into by Moore, West and Westcott, and it is made with express reference thereto, "the said Kinsey and Morris fully understanding the original agreement mentioned." The parties are, therefore, bound by its terms, as construed by the Court. The two instruments will be taken together, and construed as one contract. Rorabacher vs. Lee, 16 Mich., 172; Herald vs. Hodgdon, 16 Me., 219; Spangler vs. Springer, 22 Pa. St., 454; Vangine vs. Saylor, 18 Ark., 65; Rogers vs. Kneeland, 13 Wend., 114; Dillingham vs. Estill, 3 Dana, 23; Stacy vs. Randall, 17 Ill., 467; Hill vs. Huntress, 43 N. H., 480; Norton vs. Kearney, 10 Wis., 443; Logan vs. Talbott, 4 Green (Ia.), 372; Phillips vs. Scott, 2 Watts (Pa.), 318; Bradley vs. Marshall, 54 Ill., 173; Smith vs. Turpin, 20 Ohio St., 473; Allen vs. Norfsinger, 13 Ind., 494; Parks vs. Cooke, 3 Bush., 169; Van Hagen vs. Van Rensselaer, 18 Johns., 420. "And the recitals in each may be explained or corrected by a reference to any other, in the same way as if they were only several parts of one instrument." 2 Pars. Cont., 502. See, also, Sawyer vs. Hammatt, 15 Me., 43; Price vs. Bingham's Ex'rs, 7 Har. & Johns., 296.

In the first recital of the Westcott, Kinsey and Morris agreement, it is stated, that, by the original agreement, "amongst other things, the said Moore assigns and conveys to said West one-fourth, and to said Wescott one-half, and retains for himself one-fourth of said interest contained in said letters patent." If, by this recital, the parties intended to imply that the original agreement "assigns and conveys" one-half of the legal title to the letters patent to Westcott, one-fourth to West, and retains one-fourth himself, then they were mistaken as to its legal effect; for, as we have seen, it in terms conveys the *whole* of the legal title to West and Westcott, jointly. This recital is inconsistent with the terms of the original contract; it will, therefore, be corrected by construction.

The second recital contains a correct statement of facts, and will aid in a correction of the first. Here it is recited as one of the provisions of the original agreement, "that, from sums collected under the said letters patent, from sales, royalties or settlements, or from any other source, shall be deducted the costs, charges and expenses of collecting the same, including all litigation expenses, save those of the extension application, and then the net profits or receipts shall be divided among said parties, to said Moore one-fourth, said West one-fourth, and Westcott one-half part." It is also recited that Moore's interest is to continue during the life of the extended patent. After the recitals in the contract, and "fully understanding the original agreement," the parties covenant and agree as follows:

> Therefore, this Article of Agreement witnesseth: That said John M. Westcott hereby agrees to and with said Isaac Kinsey and Aaron Morris, and does hereby set over and assign to each of them one-third part of his one-half interest, retaining one-third part himself in said letters patent; and said Kinsey and Morris, fully understanding the original agreement mentioned, do hereby agree with said Westcott, to be at one-third expense each with said Westcott, jointly as set forth in said agreement, and shall be equally entitled and receive one-third profit or net proceeds, if any, in said half interest; *and in all things pertaining hereto to be governed by this and the original contract and agreement.*"

By the ordinary rules of construction, this contract will be modified, if necessary, by the original agreement; in addition, the parties have expressly stipulated, that "in all things" they will be governed by the terms of the said original agreement. Westcott did not, and could not, confer upon Morris and Kinsey any greater interest than he individually possessed, by virtue of his contract with Moore, unless it was in furtherance of his trust. Westcott had no power to bring Morris and Kinsey into the arrangement or agreement made by him with Moore and West, without their consent. It needs no argument to show that if several persons enter into an agreement for their mutual benefit, one of the parties cannot afterwards make other persons parties to such agreement, so as to entitle them to the benefits thereof, without the consent of all. Westcott's individual interest in the letters patent was one-half of the "net profits" realized. For a division of *this interest* he could properly contract with Morris and Kinsey. "This, and nothing more."

The contract with Morris and Kinsey purports to be without other consideration than a *desire* on their part "of obtaining an interest in said letters patent." For this purpose Westcott could not convey any portion of the legal title of the patents, *individually*. He *jointly with* West had power to convey such title, for the purpose of realizing a profit for the benefit of himself, West and Moore. Of this fact Morris and Kinsey were bound to take notice, for "it is so nominated in the bond," and they made this contract, "fully understanding the original agreement." It will hardly be contended that Morris and Kinsey, by virtue of their contract with Westcott, could demand of Moore and West the right to participate with *them* in *their* contract with Westcott, or to exercise any of the powers conferred by Moore upon West and Westcott. A trustee cannot, by his own act and deed, assign or transfer his trust, or delegate a power conferred specially upon him, to another. Moore and West can well say to Kinsey and Morris, "We had nothing to do with *your* contract; we did not consent to its terms; we have not agreed that you should have part and parcel with us in our contract with Westcott.

If a trust is of a discretionary nature, so strict is the rule against delegation that the trustee will be held responsible for all mischievous consequences, if he attempts to delegate it, "and the exercise of the discretion will be *absolutely void* in the substitute." Perry on Trusts, 369; see, also, Hilch vs. Leworthy, 2 Hare, 200; Bradford vs. Bradford, 2 Sim. Such a trust cannot even be delegated to a co-trustee. Crewe vs. Dicken, 4 Ves., 97. In a case where a sum of money was given to three trustees, to be distributed in charity at their discretion, they divided it, and each one took a part under his exclusive control, Lord Hardwicke said: "I am of the opinion that the trustees could not divide the charity into three parts, and each trustee nominate a third absolutely, because the determination of the propriety of every object was left by the testator to the discretion of *all* the executors." Att'y General vs. Gleg, 2 Atk., 356. If a trustee conveys the trust estate in violation of the terms of his trust, the *cestui que trust* may follow it into the hands of a grantee with notice, or one who takes without consideration. If a purchaser for value takes with notice, the estate will be charged with the trust in his hands, "for, knowing another's rights to the property, he throws away his money." Oliver vs. Piatt, 3 How., 333; Wormley sv. Wormley, 8 Wheat., 423; Murray vs. Ballou, 1 John., Ch. 567; Bailey vs. Wilson, 1 Dev. & Bat., 182; Dean vs. McKnight, 6 Halst., 385; Case vs. James, 29 Beav., 512; Makreeth vs. Symmons, 15 Ves., 340. Not only can the *cestui que trust* follow the trust property, if wrongfully sold, but he may follow the *proceeds*, so long as they can be traced and identified. Perry on Trusts, § 835; 2 Wash. Real Prop., 478.

Westcott's contract with Morris and Kinsey shows upon its face that it was made without consideration, as far as West and Moore were concerned. The production of profit, as provided in the original agreement, was not the object of the parties. Kinsey and Morris parted with nothing of value, therefore, they can suffer no injury. If they are permitted to participate in the original contract, they do so as mere volunteers, without consideration, and without the consent of West and Moore, and this for the purpose of sharing the benefit of their agreement. If this is equity, then fraud is equity.

The legal effect of Westcott's contract with Morris and Kinsey was to confer upon them an equal interest with him in one-half of the net profits resulting from his contract with Moore and West. Westcott's share of the profits was the subject of the contract, in regard to which he had the right to make any contract he chose, but in doing so he could not affect any interest held by Moore and West. The law in regard to partnership well illustrates this point: "An agreement between one co-partner and a third person, that he shall participate in the profits of the firm, as profits, renders him liable, as partner, to the creditors of the firm, although, as between himself and the members of the firm, *he is not their partner.*" Fitch vs. Harrington, 13 Gray, 474. "The contract of partnership must be voluntary,—that is, all the partners must consent and agree to it. This is so essential that no person can be introduced into a firm without the consent of all who are members to it." Pars. Part., 12. See, also, Channel vs. Fassitt, 16 Ohio, 166; Kingman vs. Spurr, 7 Pick., 235; Murray vs. Bogert, 14 Johns., 318; Modwell vs. Keever, 8 Watts, § 63; Nicholl vs. Mumford, 4 Johns., Ch. 318.

WHO ARE NECESSARY PARTIES.

Having ascertained by construction what we believe to be the meaning of the contracts in question, as well as the rights of the parties thereunder, it remains for us to consider the question of who are necessary parties to the suit. The rule in equity undoubtedly is, that all who have an interest, legal or equitable, in the *issues* involved in a cause, should be made parties thereto, either plaintiff or defendant. Of course, no exact rule can be given as to who are necessary parties. Facts and circumstances engraft exceptions upon all general rules. Mr. Story gives, as a general rule, that "All persons materially interested in the *subject matter* ought to be made parties to the suit, either as plaintiffs or defendants, however numerous they may be, in order, not only that complete justice may be done, but that a multiplicity of suits may be prevented." Story Eq. Plead., § 76. Mr. Calvert, in his work on Parties, after a review of the authorities, says: "Upon the combination of all these authorities, it is proposed to state the general rule in the following words: All persons having an interest in the *object* of the suit ought to be made parties." Calvert on Parties, Ch. 1, § 12. Be it an interest in the *subject* or the *object* of the suit that determines the rule, "courts of equity will not suffer it to be so applied as to defeat the very purpose of justice, if they can dispose of the merits of the case before them without prejudice to the rights of, or interest of, other persons who are not parties, or if the circumstances of the case render the application of the rule wholly inapplicable." Story Eq. Plead., § 77. The rule "ought to be restricted to cases of parties to the interests involved in the issue, and necessarily to be affected by the decree." Wendell vs. Rensselaer, 1 Johns., Ch. 352. The fundamental principle underlying the rule, whatever it may be, is the prevention of litigation, as well as to settle and determine the rights of all persons who are materially interested in the matter in controversy, "so as to make the performance of the order of the Court perfectly safe to those who are compelled to obey it." 1 Dan., Ch. Pr., (5 Am. Ed.,) 190. See Pom. on Rem., 295; Story Eq. Pl., § 76.

In any given case, the question of "necessary parties," or "party in interest," will be determined by the facts involved in the issue and the "object of the suit."

If the complaint is demurred to for a "defect of parties," or if a person makes application to be admitted as a party, the Court will determine from the *facts* presented whether such person *has* a material interest in the matter in controversy.

In the case at bar, Hiram Moore is not a party to the suit. Is he a necessary party as being a "party in interest?" The "subject of the suit" is the letters patent issued to Moore, as stated in the bill. The "object of the suit" is to enjoin the defendants from infringing the patents, and for the collection of damages. Moore's "interest" will be determined by his contract with West and Westcott. Will a decree in the suit bind Moore or his legal representatives, and determine effectively all the rights given or reserved to him in the contract in question, and "make the performance of the order of the Court perfectly safe to those who are compelled to obey it."

The contract, as we have seen, vests the undivided legal title to the letters patent in Westcott and West. "As the remedy in equity is given in order to protect a legal right, and as the statute gives a right of action to the person or persons interested, whether as patentees, assignees or grantees of the exclusive right for a particular district, it follows that any person holding the legal title, or the right to bring an action, may bring a bill for an injunction." Curtis on Patents, p. 540, § 402. In the contract Moore gives West and Westcott, irrevocably, full and complete power to bind him in all things concerning the patents, they relying solely upon their own judgment and discretion in the premises. He authorizes them to make contracts and bring suits, and agrees that their action in the matter shall conclude him or his legal representatives, reserving only the right to receive one-fourth of the "net profits" resulting from their management. He can bring no action, either at law or in equity, under the patent. His right and remedy rests in covenant with West and Westcott, with which the defendunts in this action have nothing to do. "When the patentee assigns his whole interest in the patent, reserving merely an annual income to be paid by the grantee, he can have no action, either at law or in equity, under the patent, but his only remedy, in case the income is not paid, is an action upon the covenant." Curtis on Patents, 438,–589. See, also, Hartshorn vs. Day, 10 How., 211. Any decree the Court may render in this suit will conclude Moore and his legal representatives, and the defendants will be safe in the performance of it.

Treating West and Westcott as trustees for Moore, under the peculiar provisions of the contract, it would not be necessary to make him a party. "When it appears, on the face of the contract, that it was the intent of the parties to exclude the *cestui que trust* from the necessity of taking any part in the transaction, in relation to the management of the trust, the *cestui que trust* is not a necessary party." 1 Dan. Chan. Prac. (5th ed.), 222 n; Kerrison vs. Stewart, 93 U. S., 155,–160. In this case there is no conflict between the trustees and Moore, and the trustees being clothed with express power to act for, and bind him in all matters concerning the subject of the trust, it follows that he is not such a "party in interest" as to render him a necessary party to the suit. The reason for the rule does not exist, therefore, the rule itself will not apply. Carey vs. Brown, 92 U. S, 171.

It is also insisted that Morris and Kinsey are necessary parties to the action. If we are right in our construction of the contract between Moore, West and Westcott, it follows, that Morris and Kinsey cannot claim such an interest in the "subject" or "object of the suit" as to render them necessary parties. Could they have entered into a contract with Moore, or taken an assignment of the letters patent from him, after the execution of his agreement with West and Westcott, that would have given them any title to the patents, or any interest whatever, affecting the terms of such agreement? There can be but one answer to this question. Neither could Westcott, individually, convey any interest in the patents to any person, nor enter into any contract that would disturb his relations with West and Moore, under his agreement with them. He could only convey, jointly, with West, in *furtherance* of his *trust.* Whatever rights Morris and Kinsey possess rest in covenant with Westcott. The "subject" of their contract was Westcott's share of the profits, resulting from his arrangement with West and Moore. Theirs is an independent contract, executed for a purpose entirely different from that of the Moore agreement, and one that in no wise concerns the defendants in this action. A decree in this suit will operate as a complete bar against Morris and Kinsey. What right of action could they possibly have against the defendants after judgment in this suit between the parties to the record? Their rights, if any they have, are entirely and remotely consequential. There is no privity between them and Moore, West and Westcott. "A person is not properly a party to a suit, between whom and the plaintiff there is no privity or common interest, but his liability, if any, is to another person." Story Eq. Pl., § 227. If Morris and Kinsey took no title under their contract, what judgment could be rendered for or against them in this case? "No person should be made a party who has no interest in the suit, and against whom, if brought to a hearing, no decree can be had." Story Eq. Pl., § 231. Morris and Kinsey are not "parties in interest" in the issues involved in the suit, therefore, they should not be joined.

As to Lawrence and the Wayne Agricultural Co., we need say but little, for it is disclosed that whatever interest they had in the "subject of the suit" they took *pendente lite*. "Generally speaking, an assignee, *pendente lite*, need not be made a party to a bill, or be brought before the Court, for any person purchasing *pendente lite* is treated as a purchaser with notice. And it will make no difference whether the assignee *pendente lite* be the claimant of a legal or equitable interest, or whether he be the assignee of the plaintiff or of the defendant." Story Eq. Pl., § 156. See 1 Dan. Ch. Pr., 281; Sedgwick vs. Cleveland, 7 Paige, 287; Cook vs. Mancins, 5 Johns., Ch. 93; Brandon vs. Cabiness, 10 Ala., 155; Hoxie vs. Carr, 1 Sumner, 173; Allen vs. Pool, 54 Miss., 232; Boulden vs. Lanahan, 29 Md., 200.

As before stated, these agreements were directly involved in a suit by West and Westcott against The Wayne Agricultural Works, L. L. Lawrence and Isaac

Kinsey, which came before Judge Gresham upon a demurrer to the bill for want of equity, and because Moore and Morris were not made parties. In that case, Judge Gresham, in a carefully prepared opinion, held that Kinsey and Morris did not take any title to the patents under their agreement with Westcott, and that neither Moore nor Morris were necessary parties to a suit, which, like this, was for infringement of the patents.

(11 Fed. Rep. 298, 302.)

It is, therefore, respectfully submitted that the proper parties are before the Court.

INFRINGEMENT OF THE EXTENDED 1860 PATENT—REC. 79.

The first and second claims of this patent only are involved. These are:

1. "I claim the conduit, or passage H, arranged between the bottom of the hopper and the discharge, in combination with the oblique discharge I and the toothed distributing cylinder C, substantially as described, and for the purposes herein specified.

2. "I claim the combination of separate bearings of the cylinder with a single shaft bearing in the cylinder, shorter than the cylinder and larger than the shaft, in the manner and for the purposes substantially as herein specified."

The patentee says in the specification:

"The object of my said improvements is the more evenly and equally to distribute the grain or seed to be sowed, and to render the machine more simple and less liable to get out of order. * * *

"They consist, first, in combining a conduit or passage for the grain, arranged between the bottom of the hopper and the discharging orifice, with the oblique discharging orifice and the distributing cylinder; second, in combining separate bearings for the cylinders with a single bearing in the cylinder for the shaft, in the manner hereinafter described.

"By this means we attain important advantages. The warping or twisting of the seed box is a fruitful source of trouble in machines of this class, for the hopper being rigidly fastened at the bottom of the seed box, any warping or twisting of the latter will cause the hopper to change its position relative to the shaft, and, if the cylinder be firmly fastened upon its shaft, it will bind against the sides of the hopper and in its bearings, producing much friction, and increasing the draft of the machine and its liability to get out of order. By having the shaft bearing in the cylinder larger than the shaft, the evil effects of a displacement of the cylinder will be obviated in a great measure, as the axis of the cylinder need not be coincident, or even parallel with the axis of the shaft, but may vary considerably from it, without the cylinder binding upon the shaft, and the cylinder will still be controlled by the revolution of the shaft, the cylinder being retained in place within the hopper by its own independent bearings."

The patentee describes the distributing cylinder as having an independent bearing at each end in the sides of the hopper, for the purpose of retaining it in proper position for work. He also says that the narrow shaft bearing F, within the distributing cylinder "is made larger than the shaft to allow the latter to pass loosely through the cylinder, and thus it will be seen that hopper and cylinder can alter their position considerably with respect to the shaft, and still the cylinder will be controlled by the revolutions of the shaft and not bind upon it."

In "gravity feeds" the discharge orifice was at the bottom of the hopper, and the cylinder ~~nearly~~ merely acted as an agitator; it was, therefore, necessary that it should revolve close to the wall of the hopper, otherwise the seed would flow out by gravitation, but in a "force feed," in which the discharge opening is at the side of the hopper, to which the grain has to be carried or forced around and up, it is obvious that if the teeth of the distributing cylinder were revolved close to the wall of the hopper much grain would be crushed and destroyed. To prevent this, the patentee provided the conduit or passage H of the claim, and, speaking of this in the body of the specification, says:

> "It is arranged around the cylinder C as shown, and as the cylinder revolves, its teeth move the grain through the conduit to the oblique discharge orifice I I. This conduit H passes beyond the lowest point of the cylinder, and then curves or inclines slightly upward, so that the grain cannot fall out from the conduit by gravitation, but must be moved, as it were, up hill before it can reach the discharge orifice."

We now invite Your Honor to a comparison between the subject matter of these claims and the defendant's machine, which was held by the Circuit Court to be an infringement, and so much of which as contains the device in controversy is illustrated by complainant's exhibit, "Defendant's Hopper, with seed-cups and driving shaft." (Rec. 93.)

An inspection of this exhibit will show that each seed-cup or secondary hopper is constructed with an elevated oblique discharge orifice, and provided with a tooth-distributing cylinder, between which and the bottom of the hopper is a seed passage-way, which continues around and up to the discharge, precisely as and for the purpose described in the patent.

The patentee shows and describes a double oblique discharge, with a cylinder long enough to supply grain to two colters; but he says that it may be made with a hopper to each colter, in which case the discharge is to be "a simple face oblique to the face of the cylinder teeth." In such case, of course, the cylinder need only be one-half the length. The defendants' machine is made in accordance with these described equivalents, and is, we submit, clearly within the terms of the first claim.

In a close case as to novelty and infringement of the second claim, there might be a nice question of construction; but where the novelty is unquestioned, as it is in this case, and when the defendants' device contains every element of the claim, no matter how construed, construction is not thought to be important. The exhibit shows the defendants' distributing cylinder to have separate end bearings at each side of the hopper, and a single shaft bearing shorter than the cylinder and larger than the shaft, substantially as shown and described in the patent and for the same purpose.

No damages were found or sought for in the accounting, on account of the infringement of this claim, but we think and submit that the decree finding infringement of it is correct.

THE 1861 PATENT. (Rec. 83.)

The sixth claim of this patent, which reads as follows, is the only one in controversy:

> "Sixth.—I claim the combination of a removable driving-shaft, with a series of seeding cylinders having independent bearings, whereby said shaft can, at pleasure, be removed to allow any of said cylinders to be taken out for repairs, without displacing the rest, substantially as described."

This is clearly infringed; but as the term of the patent has long since expired, and as it was not taken into consideration upon the accounting, neither party is interested in it except to the very small extent it may affect the question of costs, and we therefere think this Court should not be asked to review the question.

DAMAGES.

On the first reference the Master reported that the complainants had an established license fee of $2 for two-horse drills, and $1 for one-horse machines, and that the defendants had made and sold 800 of each size (Rec. 27), but on exceptions the Court below held that the evidence did not show this, and that "without further evidence the plaintiff is entitled to nominal damages; but that there may not be a failure of justice, the case is remanded to the Master, with directions to admit further evidence by each party, if offered, and to report the same and his conclusions." (Rec. 30.)

The first report of the Master is not embodied in the transcript, but the substance of it may be gathered from Judge Woods' opinion, p. 26.

The Master's second report is printed at p. 19, and in this he says: "The effort has been to prove that the device or combination covered by the first claim of the patent No. 30,685 was an invention of great value and utility, and complainants are entitled to damages for the infringement thereof by defendants." (Rec., 20.)

"The chief value of plaintiff's combination is in the channel or conduit H, which is so constructed that a reservoir of loose grain is collected in the bottom of the seed-cup, into which it falls from the hopper without obstruction, and from there it is lifted by the toothed cylinder to the discharge orifice, where the grain is discharged without being cracked or injured. In the 'gravitation feeds,' in use prior to the complainants' invention, the revolving cylinder was fitted so closely to the inside of the cup that the grain was cracked or injured in passing. The complainants' device is for a 'force feed,' which lifts the grain to an elevated discharge orifice, as distinguished from a gravitation feed, in which the grain passes from the hopper to the discharge orifice at the bottom of the cup, where it drops to the ground. The force feed has an elevated discharge orifice to which the grain is lifted; the gravitation feed has a discharge orifice at the bottom of the cup, and the grain is released without being lifted. * * * *

"I now report and find that the whole number made and sold by defendants which infringed all three of the elements of the combination covered by the first claim was 2,000, and that of these, one-half were one-horse and one-half two-horse drills. The burning of defendants' factory and the loss of their books have made it impossible to get at the exact number.

"There remains to be considered the question of the value of this claim or combination to the defendants, who used it in violation of complainants' rights. The evidence on this subject is conflicting. During the life of the patent some manufacturers considered it of so much value that they paid a stipulated license for its use. Now they say it is worth very little, if anything, and it may be true that its value has been impared or destroyed by new devices and improvements. The value of this combination, as estimated by the witnesses, varies from nothing to six dollars per drill. In the highest estimates the witnesses must refer to the increased value to the farmer who uses the machine. The manufacturer expects to make a profit, and it would not be fair to charge him the value of the combination in that sense."

"I report and find that the camplainants are entitled to damages as follows:"

For 1000 one-horse drills at 75 cents each..........	$ 750.00
For 1000 two-horse drills at $1.50 each...............	1500.00
Total damages......................	$2250.00

Upon argument of the defendants' exceptions to this report p. 22, Judge Woods restricted the account to the number of machines first reported by the Master namely 800 of each of the two sizes and ordered a decree for $1800 on account of the same. (Rec. 26.)

Upon the second reference, the complainants confined their evidence to such facts as would enable the master and Court to assess the damages under the rule laid down by this Court in Saffolk Co. vs. Hayden, 3 Wall 315, in which Mr. Justice Nelson speaking for the Court says : (320).

> "This question of damages, under the rule given in the statute, is always attended with difficulty and embarrassment both to the Court and Jury. There being no established patent or license fee in the case, in order to get at a fair measure of damages, or even an approximation to it, general evidence must be resorted to. And what evidence could be more appropriate and pertinent than that of the utility and advantage of the invention over the old modes or devices that had been used for working out similar results. With a knowledge of these benefits to the persons who have used the invention, and the extent of the use by the infringer, a jury will be in possession of material and controlling facts that may enable them in the exercise of a sound judgment, to ascertain the damages, or, in other words, the loss to the patentee or owner, by the piracy, instead of the purchase of the use of the invention."

In McKeever vs. the United States, 23 A. G. 1525, the Court of Claims, in a case very much like the one at bar, says: (1521.)

> "The rule which the Court adopts as the measure of these damages is the fair and reasonable value of a license, to manufacture and use under the Claimant's patent, being such a royalty as it may reasonably be presumed the defendants would have been willing to pay and the claimant to accept, if the matter at the outset had gone to an express agreement."

This was affirmed on appeal to the Court, Nov. 20, 1882.

The Court further say: (1529.)

"Where the Plaintiff has clearly suffered a material loss by defendants' use of his invention, and has produced all the evidence which the nature of his case admits of to establish the amount, there has never yet been a case in which his recovery has been restricted to nominal damages."

In order to simplify the question the proofs on the second reference were all addressed to one claim, viz. the first of patent No. 30,685.

Six men of large experience in handling grain drills were examined by the complainants as witnesses on this branch of the case, and they all substantially agree that the space or passage H is absolutely essential in "force feeds," because, without it the grain would be cracked or injured, and that by the use of the oblique discharge the delivery is more even and regular.

They differ widely as to what would be the difference in price at which a drill thus injuring the grain, and one which did not, would sell for, some saying the former would not sell for any price; others, that they could not be given away, and others, that there would be about $20.00 difference.

Each witness was asked to assume what the Court has decreed, viz: that manufacturers had not the right to make grain drills having a passage around the distributing cylinder, terminating in an elevated oblique discharge orifice, and to state what in their opinion would be a fair and reasonable royalty or license fee per drill for the privilege of making and selling with such a feed.

Mr. Marley says, from $3 to $5 for two-horse, and from $2 to $3 for one horse. (Rec. 39.)

Mr. Patric says, $5 for two-horse. (Rec. 42.)

Mr. Westcott says, $5 for two-horse and $2.50 for one-horse. (Rec. 57.)

Mr. Lefevre says, about $5 for two-horse, and from $2 to $3 for one-horse. (Rec. 63.)

Mr. Thompson says, $5 for two-horse and $2.50 for one-horse. (Rec. 67.)

Mr. Shearer says, from $5 to $6 for two-horse, and half as much for one-horse. (Rec. 73.)

So far as the record discloses, Moore was the first to make a force feed with an elevated delivery. He was, therefore, a pioneer in the art, and entitled to a broad application of the doctrine of equivalents.

Some evidence was offered by the defendants, tending to show that the oblique discharge had no merit over a straight discharge, but this also tends to show that one is the equivalent of the other, and therefore, it was contended that all should be included in the account, but they were not, because, we think, the evidence shows that the defendants made and sold over 1700 two-horse drills, while only 800 were allowed by the Court.

The evidence also shows that the Moore feed added about $20 to the value of a drill, and that the price of a drill is now about that amount less than it was when the defendant's piracy commenced.

In conclusion, we think the amount decreed very much less than the complainants are entitled to, and certainly much less than other manufacturers paid for licenses under other patents. See depositions of Marley, 40, and Patric, 43.

We respectfully submit that the decree should be affirmed with costs.

E. E. WOOD.
EDWARD BOYD.

CINCINNATI, Dec. 24, 1888.

130-167

130-167.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 1498.

FRED. B. SMITH, W. I. STEERE, E. G. MATHER, HORACE BARNARD, AND C. W. SMITH, COUNTY COMMISSIONERS, APPELLANTS,

vs.

JOHN E. ADAMS.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF DAKOTA.

FILED FEBRUARY 11, 1889.

SUPREME COURT OF THE UNITED STATES.

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APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF DAKOTA.

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1 TERRITORY OF DAKOTA,
Fifth Judicial District, } *ss:*

In the District Court within and for Brown County.

JOHN E. ADAMS, Pl't'ff & Appellant,
vs.
FRED. B. SMITH, E. J. MATHER, W. I. STEERE, HORACE BARNARD, and C. W. SWIFT, as County Commissioners, Def'ts and Respondents.

Whereas, on the 18th day of July, 1888, in the district court within and for the county of Brown, the above-named respondents recovered a judgment against the above-named appellant sustaining the demurrer, dismissing the action, and for costs of suit, taxed at ——;

And the above-named appellant, feeling aggrieved, hereby intends to appeal therefrom to the supreme court of the Territory of Dakota:

Now, therefore, we do hereby undertake that the said appellant will pay all costs and damages which may be awarded against him on said appeal or on a dismissal thereof, not exceeding two hundred and fifty dollars, and do also undertake that if the said judgment so appealed from, or in any part thereof, be affirmed or said appeal be dismissed the said appellant will pay the amount directed to be paid by the said judgment or the part of such amount as to which the said judgment shall be affirmed, if it be affirmed only in part, and all damages and costs which shall be awarded against said appellant on said appeal.

Dated July 25, 1888.

CHAS. E. BALDWIN.
DON C. McKENZIE.
JOHN D. LAVIN.

2 TERRITORY OF DAKOTA,
Brown County, } *ss:*

On this 25 day of July, A. D. 1888, before me, the subscriber, appeared Chas. E. Baldwin, Don C. McKenzie, and John D. Lavin, to me personally known to be the same persons described in and who executed the above undertaking, and severally acknowledged that they executed the same.

In witness whereof I have hereunto set my hand and official seal the day and year above written.

[NOTARY SEAL.] C. W. ATKINS,
Notary Public, Dak.

TERRITORY OF DAKOTA,
Brown County, } *ss:*

Chas. E. Baldwin, Don C. McKenzie, & John D. Lavin, being severally sworn, each for himself says: The said Chas. E. Baldwin says he is a resident and freeholder of the county of Brown, in this Territory, and that he is worth the sum of $500.00 in property

within this Territory over and above all his debts and liabilities
and exclusive of all property exempt from levy and sale on execu-
tion; and the said Don C. McKenzie, for himself, says that he is a
resident and freeholder of the county of Brown, in this Territory,
and that he is worth the sum of $500.00 in property within this
Territory over and above all his debts and liabilities and exclusive
of all property exempt from levy and sale on execution; and the
said John D. Lavin, for himself, says he is a resident and freeholder
of the county of Brown, in this Territory, and that he is
3 worth the sum of $500.00, over and above all his debts and
liabilities and exclusive of all property exempt from levy and
sale on execution, in property within this Territory.

CHAS. E. BALDWIN.
DON C. McKENZIE.
JOHN D. LAVIN.

Subscribed and sworn to before me this 25th day of July, 1888.

[NOTARY SEAL.] C. W. ATKINS,
Notary Public, Dak.

The above-named sureties reside at Columbia, Brown county, D. T.

[Endorsed:] Territory of Dakota, county of Brown. In district court. John E. Adams *vs.* Fred. B. Smith *et al.* Undertaking on appeal to supreme court. District court, Brown county, Dakota. Filed Jul. 27, 1888. —— ——, clerk.

4 *Notice of Appeal from Judgment.*

TERRITORY OF DAKOTA,
Fifth Judicial District, } *ss:*

In the District Court in and for the County of Brown.

JOHN E. ADAMS, Pl'ff & Appellant,
vs.
FRED. B. SMITH, E. J. MATHER, W. I. STEERE, HORACE BARNARD, and C. W. SWIFT, as County Commissioners, Def'ts & Respondents.

Please to take notice that the plaintiff in the above-entitled action appeals from a judgment entered therein, on the 18 day of July, 1888, in favor of the defendants against the plaintiff, sustaining the demurrer, dismissing the action, and for costs, taxed at —— dollars and —— cents, to the supreme court of the Territory. Said appeal is taken from the whole of said judgment.

Yours, &c., JAMES WEELS,
Attorney for Plaintiff.

To Skellman & Mott, M. J. Gordon, Jenkins & Campbell, and John Perry, Esq., attorneys for defendants, and E. K. Loderick, Esq., clerk of the district court of the county of Brown, D. T.

[Endorsed :] Territory of Dakota. In district court, Brown county. John E. Adams *vs.* Fred. B. Smith *et al.* Notice of appeal from judgment. Due service of a copy of this notice of appeal and undertaking attached is admitted this 27th day of July, A. D. 1888.
Jenkins & Campbell, M. J. Gordon, J. H. Perry, & Skillman
5 & Mott, def'ts' att'ys. Due service of a copy of this notice
of appeal and undertaking attached is admitted this 27th
day of July, A. D. 1888, at 1.45 p. m. E. K. Lodewick, by Chas. L. Brockway, deputy clerk, dist. court, Brown Co., D. T. District court, Brown county, Dakota. Filed Jul. 27, 1888. E. K. Lodewick, clerk, by Chas. L. Brockway, deputy.

6 TERRITORY OF DAKOTA, } *ss:*
County of Brown, }

In District Court, 5th Judicial District.

In the Matter of the Petition of JOHN E. ADAMS.

On reading the petition, duly verified, of John E. Adams, dated on the 22nd day of July, 1887, for leave to contest the validity of the election held in Brown county, Dakota, on the 12th day of July, 1887, under an act entitled "An act to provide for the relocation of county-seats in counties where county-seats have been located by a vote less than a majority of all the electors voting thereon," approved March 11th, 1887—

Ordered, That above-named elector, John E. Adams, have leave to contest said election and bring an action in the district court for that purpose upon furnishing security, as provided in section 8 of chapter 54 of the laws 1885.

Dated July 28, 1887.

JAMES SPENCER, *Judge.*

7 TERRITORY OF DAKOTA, *County of Brown:*

In District Court, Fifth District.

In the Matter of the Application of JOHN E. ADAMS for leave to contest an election held in the county of Brown, in said Territory, on the 12th day of July, A. D. 1887, under an act of the Legislature of Dakota entitled "An act to provide for the relocation of county-seats in counties where county-seats have been located by a vote less than a majority of all the electors voting thereon."

Your petitioner, John E. Adams, respectfully represents that he is a resident of the county of Brown, in the Territory of Dakota, and a duly qualified elector of said county; that he is about to contest an election held in said Brown county on the 12th day of July, A. D. 1887, at which the question of relocating the county-seat of Brown county was voted upon under the provisions of an act of the Legislative Assembly of the Territory of Dakota entitled "An act to provide for the relocation of county-seats in counties where county-seats have been located by a vote less than a majority of all the electors voting thereon."

That your petitioner will contest said election under the provisions of section six (6) of an act of the Legislative Assembly of the Territory of Dakota, entitled "An act to provide for contesting elections for county officers and for the location of county-seats, and for other purposes," approved March 12, 1885.

Your petitioner further shows that said county of Brown is and for many years last past has been a duly organized county; that under and by virtue of section 4 of chapter 21 of the Political Code of said Territory the county-seat of said Brown county was
8 located and established at Columbia, in said county, and that
ever since the location of said county-seat as aforesaid the same has remained at Columbia, under the provisions of section 6 of chapter 21 of said Political Code, by reason of the fact that no place received a majority of all the votes cast at the election held under the provisions of said section 6 of chapter 21 of said Political Code.

The petition further shows that said Brown county has a population of more than twelve thousand people, as shown by the census of 1885, and has an area of more than forty-eight congressional townships.

Your petitioner further shows that on the eleventh day of March, 1887, the Legislature of said Territory passed an act entitled "An act to provide for the relocation of county-seats in counties where county-seats have been located by a vote less than a majority of all the electors voting thereon," which said act was approved on said eleventh day of March, 1887; that under and pursuant to the provisions of said act a petition was, in the month of May, 1887, signed by more than one-third of the legal voters of said Brown county, as shown by the vote cast at the last general election, praying that the judge of the district court of the district in which said Brown county is situated issue an order directing an election to be held in said Brown county for the purpose of voting upon the question of relocating the county-seat of said Brown county, which said petition was presented to the judge of said court; and that thereafter the judge of said district, assuming to act under the provisions of said act, did make and sign an order directing an election to be held in said Brown county on the twelfth day of July, 1887, as prayed for in said petition; and that thereafter the register of deeds of
9 said Brown county caused a duly certified copy of said order
to be published, in one of the papers designated by the board of county commissioners of said Brown county as the official paper of said Brown county, for at least six consecutive weeks immediately preceding the said twelfth day of July, 1887; and that on said twelfth day of July, 1887, pursuant to said act and of the proceedings hereinbefore specified, the electors of said Brown county met at different places in said county and voted upon the question of relocating the county-seat of said county, and that at said elec-

tion a majority of the votes cast were in favor of relocating said county-seat at the city of Aberdeen, in said county.

Your petitioner further shows that by reason of the facts and proceedings aforesaid the said defendants and each of them threaten to and are about to remove the records, books, papers, and property belonging to said Brown county and to their respective offices from said Columbia to said city of Aberdeen, and that said defendants will, as the plaintiffs are informed and believe, forthwith remove all of said records, books, papers, and property to said city of Aberdeen unless enjoined from so doing as hereinafter prayed for.

Your petitioner further shows that the said county of Brown is and at the time of the passage of said act was the only county in said Territory which had a population of twelve thousand people, as shown by the census of 1885, and an area of at least forty-eight congressional townships, in which the county-seat had been temporarily located, under the provisions of section 4 of chapter 21 of the Political Code, and remained the county-seat, under the provisions of section 6 of chapter 21 of the Political Code, by reason of
10 the fact that no place received a majority of all the votes cast
at the election held under the provisions of said section 6 of chapter 21 of the Political Code, and was and is the only county in said Territory to which said act was or is applicable, as the Legislature well knew when it passed said act, and that the object and purpose of passing said act was to evade and nullify the act of Congress approved July 30th, 1886, entitled "An act to prohibit the passage of local or special laws in the Territories of the United States to limit territorial indebtedness and for other purposes."

Your petitioner further avers that he is informed and believes, and so charges the fact to be, that by reason of the facts above set forth the said act of the territorial Legislature and all acts and proceedings had in and about said election are absolutely void.

Petitioner therefore prays for an order of this court giving him leave to contest said election, as provided by law.

JOHN E. ADAMS.

John E. Adams, being duly sworn, says that he knows the contents of the foregoing petition, and that the same is true to his own knowledge, except as to those matters stated on information and belief, and as those matters he believes it to be true.

JOHN E. ADAMS.

Subscribed and sworn to before me this 22d day of July, A. D. 1887.

[SEAL.] J. R. JAMES.
Notary Public, Brown Co., D. T.

(Endorsed:) In the matter of the application of Jno. E. Adams for leave to contest election Petition No. 1. District court, Brown county, Dakota. Filed July 29, 1887, 5 p. m. E. K. Lodewick clerk.

Notice of Contest.

11 TERRITORY OF DAKOTA, *County of Brown:*

In District Court, Fifth Judicial District.

JOHN E. ADAMS, Pl'ff,

vs.

FRED. B. SMITH, E. J. MATHER, C. W. SWIFT, W. I. STEERE, and HORACE BARNARD, as Commissioners of Brown county, Dakota, Def'ts.

To the above-named defendants as commissioners of Brown county, Territory of Dakota:

Take notice that the above-named plaintiff, John E. Adams, an elector of said county, on leave of the district judge of said judicial district, will contest, under section 6 of chapter 54 of the laws of 1885, the validity of the election held in said Brown county on the 12th day of July, 1887, under an act entitled "An act to provide for the relocation of county-seats in counties where county-seats have been located by a vote less than a majority of all the electors voting thereon," approved March 11th, 1887, as to the right of the point declared and selected as the county-seat of said county.

Said plaintiff, John E. Adams, alleges, specifies, and sets forth the following points, facts, and grounds upon which the said election will be contested.

1. That he is a qualified elector of said county.

2. That the said Fred. B. Smith, E. J. Mather, C. W. Swift, W. I. Steere, and Horace Barnard are the duly qualified and acting commissioners of said Brown county, Territory of Dakota.

12 3. That said county of Brown is and for many years last past has been a duly organized county; that under and by virtue of section 4 of chapter 21 of the Political Code of said Territory the county-seat of said Brown county was located and established at Columbia, in said county, and ever since the location of said county-seat as aforesaid the same has remained at Columbia, under the provisions of section 6 of chapter 21 of said Political Code, by reason of the fact that no place received a majority of all the votes cast at the election held under the provisions of said section 6 of chapter 21 of said Political Code.

4. That said Brown county has a population of more than twelve thousand people, as shown by the census of 1885, and has an area of not less than forty-eight congressional townships.

5. That the counties of Brown and Cass, in said Territory of Dakota, are the only counties in said Territory that have respectively more than twelve thousand inhabitants, according to the census of 1885, and not less than forty-eight congressional townships each.

6. That the county-seat of said Cass county was located at Fargo, in said county, by a bill for an act defining the boundaries of Pembina county and creating new counties, approved January 4th, 1873.

7. That on the eleventh day of March, 1887, the Legislature of said Territory passed an act entitled "An act to provide for the relocation of county-seats in counties where county-seats have been located by a vote less than a majority of all the electors voting thereon," which last said act was approved March 11th, 1887.

That under and pursuant to the provisions of said act a petition was, in the month of May, 1887, signed by more than one- 13 third of the legal voters of said Brown county, as shown by the vote cast at the last general election, praying that the judge of the district court of the district in which said Brown county is situated issue an order directing an election to be held in said Brown county for the purpose of voting upon the question of relocating the county-seat of said Brown county, which said petition was presented to the judge of said court; and that thereafter the judge of said district, assuming to act under the provisions of said act, did make and sign an order directing an election to be held in said Brown county on the twelfth (12th) day of July, 1887, as prayed for in said petition, and that thereafter the register of deeds of said Brown county caused a duly certified copy of said order to be published, in one of the papers designated by the board of county commissioners of said Brown county as the official paper of said Brown county, for at least six consecutive weeks immediately preceding said twelfth day of July, 1887; and that on said twelfth day of July, 1887, pursuant to said last-mentioned act and of the proceedings hereinbefore specified, the electors of said Brown county met at different places in said county and voted upon the question of relocating the county-seat of said county, and that at said election a majority of the votes cast were in favor of relocating said county-seat at the city of Aberdeen, in said county.

That thereafter, on the 15th day of July, 1887, the above-named county commissioners of said Brown county met and opened the returns and declared that a majority of the votes cast at said election on the said 12th day of July, 1887, in said Brown county, were in favor of relocating said county-seat at the city of Aber- 14 deen, in said county, and thereupon said commissioners declared the city of Aberdeen to be the county-seat of said Brown county.

8. That thereafter, on the 26th day of July, 1887, the county officers of said Brown county removed their offices and the records, books, papers, and property belonging to their respective offices and to said Brown county from said Columbia to said city of Aberdeen.

9. That the said county of Brown is and at the time of the passage of said act was the only county in said Territory which had a population of twelve thousand people, as shown by the census of 1885, and an area of at least forty-eight congressional townships, and in which the county-seat had been temporarily located, under the provisions of section 4 of chapter 21 of the Political Code, and remained the county-seat, under the provisions of section 6 of chapter 21 of the Political Code, by reason of the fact that no place received a majority of all the votes cast at the election held under the provisions of said section 6 of chapter 21 of the Political Code, and was and is

the only county in said Territory to which said act was or is applicable, as the Legislature well knew when it passed said act, and that the object and purpose of passing said act was to evade and nullify the act of Congress, approved July 30th, 1886, entitled "An act to prohibit the passage of local or special laws in the Territories of the United States to limit territorial indebtedness and for other purposes."

10. That he is informed and believes, and so charges the fact to be, that by reason of the facts above set forth the said act of the territorial Legislature and all acts and proceedings had in and about said election are absolutely void.

Wherefore plaintiff demands judgment that said act entitled "An act to provide for the relocation of county-seats in counties where county-seats have been located by a vote less than a majority of all the electors voting thereon," approved March 11th, 1887, be declared unconstitutional and void, and that all acts and proceedings had thereunder be adjudged absolutely null and void, and for the return of said county offices and the records, books, papers, and property belonging to the said county offices, respectively, and to said county of Brown to said Columbia from said city of Aberdeen, and for such other and further relief as may be just.

Dated July 29th, 1887.

P. E. TAYLOR,
Plaintiff's Attorney.
(P. M. BABCOCK,
Of Counsel.)

TERRITORY OF DAKOTA, } *ss:*
County of Brown, }

John E. Adams, being duly sworn, says that he is the plaintiff in the above-entitled action, and that the annexed and foregoing notice and complaint are true to his own knowledge, except as to matters therein stated on information and belief, and as to those matters he believes it to be true.

JOHN E. ADAMS.

Subscribed and sworn to before me this 29th day of July, 1887.

CHAS. A. HOWARD,
Notary Public, Dak.

(Endorsed:) We hereby agree to be security for cost in the within entitled action: Wm. J. Turner, F. H. Townsend, J. R. James. I certify that I find the sureties in the foregoing undertaking sufficient and do approve and allow the same. E. K. Lodewick, clerk. July 29, 1887.

16 TERRITORY OF DAKOTA, *Fifth Judicial District*, } *ss:*

In District Court in and for Brown County.

JOHN E. ADAMS, Pl'ff,
vs.
FRED. B. SMITH, E. J. MATHER, C. W. SWIFT, W. I. STEERE, and HORACE BARNARD, as County Commissioners of Brown Co., Dak.

The Territory of Dakota sends greeting to Fred. B. Smith, E. J. Mather, C. W. Swift, W. I. Steere, and Horace Barnard, defendants:

You are hereby summoned and required to answer the complaint and notice of this action, a copy of which is herewith served upon you, and to serve a copy of your answer upon the subscriber, at his office, in the city of Columbia, D. T., within ten days after service of this summons on you, exclusive of the day of such service, and if you fail to answer the complaint and notice within that time the plaintiff will apply to the court for the relief demanded in the complaint.

Dated at Columbia, D. T., this 29th day of July, A. D. 1887.

P. E. TAYLOR,
Plaintiff's Attorney.

(Endorsed:) Original. Territory of Dakota, county of Brown. In district court. John E. Adams *vs.* Fred. B. Smith *et al.* No. 2. Summons, relief, complaint served. P. E. Taylor, plaintiff's attorney. District court, Columbia, Brown county, Dakota. Filed July 29, 1887, 5 p. m. E. K. Lodewick, clerk. We hereby agree to be security for costs in above-entitled action. July 29, 1887. Wm. J. Turner, F. H. Townsend, J. R. James. We, the undersigned, as commissioners of Brown county, Dakota, hereby accept and admit due service of the within and annexed notice of contest and summons this 29th day of July, A. D. 1887: C. W. Swift, ch'r., W. I. Steere, Horace Barnard, E. J. Mather. Fees, 12.00.

17 TERRITORY OF DAKOTA, *Brown County*, } *ss:*

District Court, 5th Judicial District.

JOHN E. ADAMS, Pl'ff,
against
C. W. SWIFT, FRED. B. SMITH, W. I. STEERE, E. J. MATHER, and HORACE BARNARD, as County Commissioners, Def'ts.

Come now the above-named defendants and demur to the "notice of contest" of said pl'ff herein upon the ground that the same does not state facts sufficient to constitute a cause of action against said defendants or either of them, and because said notice of contest does not state facts sufficient to constitute a cause of action, as required by section 5, chapter 54, of the laws of 1885.

Nov. 2, 1887.

M. J. GORDON,
SKILLMAN & MOTT,
JENKINS & CAMPBELL, &
J. H. PERRY,
Def'ts' Att'ys.

(Endorsed:) District court, Brown county. John E. Adams *vs* C. W. Swift *et al.* Demurrer. No. 3. A true copy. District court' Brown county, Dakota. Filed July 27th, 1888. E. K. Lodewick, clerk.

18 *Election Contest. Notice of Trial.*

TERRITORY OF DAKOTA, *Fifth Judicial District:*

District Court, Brown County.

JOHN E. ADAMS, Pl'ff,
vs.
C. W. SWIFT, FRED. B. SMITH, W. I. STEERE, E. J. MATHER, & HORACE BARNARD, as County Commissioners, Def'ts.

To M. J. Gordon, Skillman & Mott, Jenkins & Campbell, & John H. Perry, def'ts' att'ys:

Take notice that the issues in the above-entitled action will be brought to trial at the next term of the district court, to be held in and for said county, at the court-house, in the city of Aberdeen, on the 6th day of December, A. D. 1887, at 9 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

Dated Nov. 14, 1887.

JAMES WELLS,
Att'y for Pl'ff.
P. M. BABCOCK,
Of Counsel.

(Endorsed:) District court, Brown county. John E. Adams *vs.* C. W. Swift *et al.* No. 4. Notice of trial. Due service of a copy hereof is admitted this 15th day of Nov., 1887. Skillman & Mott, Jenkins & Campbell, J. H. Perry, & M. J. Gordon, att'ys for def'ts. District court, Brown county, Dakota. Filed Dec. 12, 1887. E. K. Lodewick, clerk. Jas. Wells, pl'ff's att'y.

19 *Note of Issue.*

TERRITORY OF DAKOTA, *County of Brown :*

In the District Court, Fifth District.

JOHN E. ADAMS, Pl'ff,

vs.

C. W. SWIFT, FRED. B. SMITH, W. I. STEERE, E. J. MATHER, & HORACE BARNARD, as County Commissioners.

James Wells, att'y for pl'ff.
M. J. Gordon, Skillman & Mott, Jenkins & Campbell, & J. H. Perry, def'ts' att'ys.

To the clerk of the above-named court :

Take notice that the last pleading was served and issue joined in the above action on the 2nd day of Nov., 1887.

Dated Nov. 26, 1887.

JAMES WELLS,
Att'y for Pl't'ff.

(Endorsed :) Election contest. John E. Adams *vs.* C. W. Swift *et al.* Note of issue. No. 5. District court, Brown county, Dakota. Filed Nov. 26, 1887, 10 a. m. E. K. Lodewick, clerk. James Wells, pl't'ff's att'y.

20 JOHN E. ADAMS *v.* FRED. B. SMITH.

Without expressing any opinion upon the merits of this case, as the question involved is to be presented to the supreme court in any event, I will, *pro forma,* sustain the demurrer and order judg't *pro forma* for the def'ts.

Upon appeal from such judgment the matter may be disposed of by the sup. c't without new trial in court below & judg't absolute ordered, as may be determined.

Prepare judg't accordingly.

JAMES SPENCER, *Judge.*

Endorsed : Adams *v.* Smith. Mem. District court, Brown county, Dakota. Filed July 22, 1888. E. K. Lodewick, clerk. R. Order Book, page 66.

21 *Judg't on Demurrer.*

TERRITORY OF DAKOTA, *County of Brown*:

In the District Court, Fifth District.

JOHN E. ADAMS, Pl't'ff,
vs.
FRED. B. SMITH, E. J. MATHER, W. I. STEERE, HORACE BARNARD, & C. W. SWIFT, as County Commissioners, Def'ts.

This cause coming on for hearing before the Hon. James Spencer, presiding judge of the district court of said county, at the regular December term, 1887, of said court, held in the city of Aberdeen, in said county, in said fifth district of Dakota, on due notice of trial given by the plaintiff upon the notice of contest or complaint of the plaintiff and the demurrer of the defendants thereto—the plaintiff appearing by James Wells, his counsel, and the defendants by Skillman & Mott, Jenkins & Campbell, M. J. Gordon, and John H. Perry, their counsel—

It is ordered and adjudged that the said demurrer be sustained *pro forma*; and the plaintiff electing to stand by his said notice of contest or complaint without amendment thereof, it is, *pro forma*, ordered and adjudged that the notice of contest or complaint herein be dismissed, and that the defendants have and recover judgment against the plaintiff for their costs and disbursements in and about this action expended; to all of which judgment the plaintiff excepts and exception allowed by the court.

By the court:

JAMES SPENCER, *Judge.*

Dated the 18th day of July, A. D. 1888.

(Endorsed:) John E. Adams *vs.* Fred. B. Smith *et al.* Judg't on demurrer. No. 6. Filed July 25, 1888, at 5 p. m. E. K. Lodewick, by Chas. L. Brockway, deputy. Order Book, pages 70 & 71. Jas. Wells, pl't'ff's att'y.

22 TERRITORY OF DAKOTA, *County of Brown*:

In District Court, Fifth District.

JOHN E. ADAMS, Pl't'ff & Appellant,
vs.
FRED. B. SMITH, W. I. STEERE, E. J. MATHER, HORACE BARNARD, & C. W. SWIFT, as County Commissioners, Def'ts & Respondents.

Assignment of Errors.

And the appellant herein says there is manifest error on the face of the record, in this:

The district court erred in sustaining the demurrer.

The district court erred in rendering judgment dismissing the plaintiff's action or contest and in rendering judgment against the plaintiff for costs.

The district court erred in not overruling the demurrer and rendering judgment for plaintiff for the relief asked for in the complaint.

The judgment should have been for the plaintiff and not for the defendants.

JAMES WELLS,
Att'y for Pl't'ff & Appellant.

(Endorsed:) John E. Adams *vs.* Fred. B. Smith *et al.* Assignment of errors. District court, Brown county, Dakota. Filed July 28, 1888. E. K. Lodewick, clerk. James Wells, att'y for pl't'ff & appellant.

23 TERRITORY OF DAKOTA, *County of Brown:*

Fifth Judicial District.

I, E. K. Lodewick, clerk of the district court within and for the said county of Brown, in the fifth judicial district of the Territory of Dakota, do hereby certify that the above and foregoing is a full, true, and complete and correct transcript and copy of the judgment-roll and the whole of it and of the order and judgment appealed from and of all the papers and proceedings upon which such order and judgment was made in the above-entitled action, except the notice of appeal and undertaking, and I certify that the notice of appeal and undertaking attached to said transcript are the original notice of appeal and undertaking filed in the above-entitled action, and proof of service of the same is endorsed thereon. The foregoing transcript is as the same now remains of record in the said court, and that said transcript of said judgment-roll and order and papers and original notice of appeal and undertaking are transmitted to the supreme court in pursuance of the appeal taken in the above-entitled action, wherein John E. Adams is plaintiff and appellant and Fred. B. Smith, W. I. Steere, E. J. Mather, Horace Barnard, and C. W. Swift, as county commissioners, are defendants and respondents.

In witness whereof I have hereunto set my hand and affixed the seal of said court this 15th day of Aug., A. D. 1888.

[SEAL.] E. K. LODEWICK, *Clerk,*
By A. C. McALLISTER, *Deputy.*

24 (Endorsed:) 435. District court, Brown county, fifth judicial district, Dak. John E. Adams, plaintiff & appellant, *vs.* Fred B. Smith, W. I. Steere, E. J. Mather, Horace Barnard, & C. W. Swift, as county commissioners, defendants & respondents. Transcript. 435. Supreme court of the Territory of Dakota. Filed Aug. 23, 1888. J. H. C. Young, clerk.

25 TERRITORY OF DAKOTA, *County of Brown:*

In District Court, Fifth District.

JOHN E. ADAMS
vs.
FRED. B. SMITH, E. J. MATHER, W. I. STEERE, HORACE BARNARD, and C. W. SWIFT, as County Commissioners.

On motion of James Wells, ordered that the above-named plaintiff on the appeal to the supreme court shall give an undertaking in the sum of five hundred dollars, to be approved by the clerk of the district court of Brown county; and it is further ordered that the clerk of the district court of Brown county, in making up the transcript in the above-entitled case for the supreme court, shall send certified copies of the judgment, orders, and all papers pertaining to the said cause instead of the originals.

Dated on this 18 day of August, A. D. 1888.

JAMES SPENCER, *Judge.*

TERRITORY OF DAKOTA, *County of Brown:*

I, E. K. Lodewick, clerk of the district court of Brown county, Dakota, do hereby certify that the above and foregoing is a true and correct copy of an order made in the above-entitled action by James Spencer, the judge of said court, on the 18 day of August, A. D. 1888, and filed in my office on the 4th day of September, 1888.

Witness my hand and the seal of said court this 4th day of September, 1888.

[SEAL.] E. K. LODEWICK,
Clerk of the District Court, Brown County, Dakota,
By A. C. McALLISTER, *Deputy.*

26 TERRITORY OF DAKOTA, *Fifth Judicial District,* } *ss:*

In the District Court within and for Brown County.

JAMES E. ADAMS, Appellant,
vs.
FRED. B. SMITH, E. J. MATHER, W. I. STEERE, HORACE BARNARD, & C. W. SWIFT, as County Commissioners, Respondents.

Whereas, on the eighteenth day of July, 1888, in the district court within and for the county of Brown, the above-named respondents recovered a judgment against the above-named appellant sustaining the demurrer, dismissing the action, and rendering the judgment against the plaintiff for costs—

And the above-named appellant, feeling aggrieved, hereby intends to appeal therefrom to the supreme court of the Territory of Dakota:

Now, therefore, we do hereby undertake that the said appellant will pay all costs and damages which may be awarded against him on said appeal or on dismissal thereof, not exceeding five hundred dollars, and do also undertake that, if the said judgment so appealed from or in any part thereof be affirmed or said appeal be dismissed, the said appellant will pay the amount directed to be paid by the said judgment or the part of such amount as to which the said judgment shall be affirmed, if it be affirmed only in part, and all damages and costs which shall be awarded against said appellant on said appeal.

Dated August 28, 1888.

DON C. McKENZIE.
CHAS. E. BALDWIN.
LYMAN TURNER, Jr.
J. D. LAVIN.
JOHN GASKIN.

27 TERRITORY OF DAKOTA, *Brown County*, } *ss:*

On this 28th day of August, A. D. 1888, before me, the subscriber, appeared Don C. McKenzie, Chas. E. Baldwin, and John D. Lavin, Lyman Turner, Jr., and John Gaskin, to me personally known to be the same persons described in and who executed the above undertaking, and severally acknowledged that they executed the same.

In witness whereof I have hereunto set my hand and official seal the day and year above written.

[NOTARY SEAL.]

C. W. ATKINS,
Notary Public, Dak.

TERRITORY OF DAKOTA, *Brown County*, } *ss:*

Don C. McKenzie, Chas. E. Baldwin, & Jno. D. Lavin, Lyman Turner, Jr., and John Gaskin, being severally sworn, each for himself says: The said Don C. McKenzie says he is a resident and freeholder of the county of Brown, in this Territory, and that he is worth the sum of $1,000 in property in this Territory over and above all his debts and liabilities and exclusive of all property exempt from levy and sale on execution; and the said Chas. E. Baldwin, for himself, says that he is a resident and freeholder of the county of Brown, in this Territory, and that he is worth the sum of $1,000 in property in this Territory over and above all his debts and liabilities and exclusive of all property exempt from levy and sale on execution; and the said Jno. D. Lavin, for himself, says that he is a resident and freeholder of the county of Brown, in 28 this Territory, and that he is worth the sum of $1,000 in property in this Territory over and above all his debts and liabilities and exclusive of all property exempt from levy and sale on execution; and Lyman Turner, for himself, says that he is a resident and freeholder of the county of Brown, in this Territory, and that he is worth $1,000 in property in this Territory over and above all his liabilities and exclusive of all property exempt from execution; and the said John Gaskin says he is worth the sum of $1,000 in property in this Territory over and above all his debts and liabilities and exclusive of all property exempt from levy and sale on execution, and that he is a resident and freeholder of Brown county, D. T.

DON C. McKENZIE.
CHAS. E. BALDWIN.
LYMAN TURNER, Jr.
J. D. LAVIN.
JOHN GASKIN.

Subscribed and sworn to before me this 28th day of August, 1888.
[NOTARY SEAL.] C. W. ATKINS,
Notary Public, D. T.

Sureties on this undertaking reside at Columbia, Dakota.

(Endorsed:) Territory of Dakota, county of Brown. In district court. John E. Adams, appellant, *vs.* Fred. B. Smith, W. I. Steere, E. J. Mather, Horace Barnard, and C. W. Swift, as county commissioners, respondents. Undertaking on appeal to supreme court. I find the sureties on this undertaking sufficient, and approve the same this 4th day of September, A. D. 1888. E. K. Lodewick, clerk dist. court, Brown Co., Dak., (seal) by A. W. McAllister, deputy. Service of a copy of this undertaking and attached order of court is admitted this 4th day of Sept., A. D. 1888. Jenkins & Campbell, M. J. Gordon, John H. Perry, & Skillman & Mott, attorneys for respondents. 435. Supreme court of the Territory of Dakota. Filed Sep. 7, 1888. J. H. C. Young, clerk.

29 In Supreme Court. October Term, 1888.

JOHN E. ADAMS, Appellant,
vs.
FRED. B. SMITH *et al.*, Respondents.

To the above-named appellant:

You will please take notice that the annexed motion to dismiss the appeal herein will be brought on for hearing and argument on the 3rd day of October, 1888, the same being a term day of said court, upon the coming in of the court on that day, or as soon thereafter as counsel can be heard.

Dated September 24th, 1888.

G. C. MOODY,
Of Counsel for Respondents.

30 Supreme Court, Dakota Territory. October Term, 1888.

JOHN E. ADAMS, Appellant,
vs.
FRED. B. SMITH, E. G. MATHER, C. W. SWIFT, W. I. STEERE, and HORACE BARNARD, as County Commissioners, Respondents.

Appeal from Brown county.

Now come the above-named respondents, by G. C. Moody of their counsel, and move the honorable the supreme court of the Territory of Dakota to dismiss the appeal herein upon the grounds—

First. That no decision or judgment of the district court has been rendered or entered in this action.

Second. That no final judgment has been rendered or entered, no costs having been taxed or inserted therein.

And for such other and further relief as shall be appropriate, and for costs.

Said motion will be based upon the record and appeal papers as they appear in said supreme court.

G. C. MOODY,
Of Counsel for Respondents.

(Endorsed:) Territory of Dakota. In supreme court. John E. Adams, appellant, *v.* Fred. B. Smith *et al.*, respondents. Motion to dismiss appeal. Service of within notice and motion admitted Oct. 2, 1888. James Wells, of appellant's counsel. Supreme court of the Territory of Dakota. Filed Oct. 3, 1888. J. H. C. Young, clerk.

31 THE UNITED STATES OF AMERICA, } *ss:*
Territory of Dakota, }

In the Supreme Court. October Term, A. D. 1888.

JOHN E. ADAMS, Plaintiff and Appellant,
vs.
FRED. B. SMITH, W. I. STEERE, E. J. MATHER, HORACE BARNARD, and C. W. SWIFT, as County Commissioners, Defendants.

Appeal from the district court of Brown county.

This action coming on to be heard at the October, A. D. 1888, term of this court, at the supreme court room, in the city of Deadwood, Territory of Dakota—present, Bartlett Tripp, chief justice, and William B. McConnell, Charles M. Thomas, James Spencer, John E. Carland, and Roderick Rose, associate justices—and the appeal herein having been argued by James Wells, Esq., and C. S. Palmer, Esq., for the appellant, and by G. C. Moody, Esq., for respondent, and the court having advised thereon, it is now here considered, ordered, and adjudged that the judgment of the said district court within and for said Brown county appealed from herein be, and the same is hereby, reversed.

And it is further ordered that this cause be, and it is hereby, remanded to the district court for further proceedings according to law and the judgment of this court.

32 And it is further considered and adjudged that appellant have and recover of the respondents his costs and disbursements on this appeal expended, taxed and allowed at eighty-one & $\frac{40}{100}$ dollars.

By the court:

BARTLETT TRIPP,
Chief Justice.

All concur. Justice Spencer not sitting.

(Endorsed:) In Supreme court, Territory of Dakota. October term, 1888. John E. Adams, plaintiff and appellant, *vs.* Fred. B. Smith, W. I. Steere, E. J. Mather, Horace Barnard, and C. W. Swift, as county commissioners, defendants and respondents. Filed in open court this 13 day of October, 1888. J. H. C. Young, clerk.

33 ADAMS *vs.* SMITH *et al.* } $\frac{20}{435}$.

The *pro forma* judgment upon respondent's demurrer is reversed upon the ground—

First. That appellant's action was properly brought and the act of the Legislature of the Territory of Dakota, passed March 11th, 1887, under which the election was held, by which the county-seat of Brown county, D. T., was removed from Columbia to Aberdeen is in conflict with the act of Congress, approved July 30th, 1886, prohibiting special legislation in the Territories of the United States.

Second. That the appellant has such an interest in the subject-matter as enables him to maintain this action.

Third. That the judgment rendered is such a final judgment as entitles him to an appeal.

34 *Affidavit and Notice of Taxation of Costs.*

TERRITORY OF DAKOTA:

In Supreme Court. October Term, 1888.

JOHN E. ADAMS, Pl't'ff and Appellant,
vs.
FRED. B. SMITH, W. I. STEERE, E. J. MATHER, HORACE BARNARD, and A. W. SWIFT, as County Com'rs, Def'ts & Respondents.

Statement of disbursements & costs:

Clerk dist. court Brown Co. for transcript	$11 40
Before argument on appeal	5 00
For argument in supreme court	15 00
For printing briefs and abstracts	36 00
Fees, clerk supreme court	14 00
Total costs	$81 40

TERRITORY OF DAKOTA, *County of Brown:*

James Wells, being duly sworn, says that he is the attorney for plaintiff and appellant in the above-entitled action, and that the costs and disbursements above mentioned have been necessarily incurred, or will be, in this action in the supreme court of Dakota, to the best of deponent's knowledge and belief.

JAMES WELLS.

Subscribed and sworn to before me this 14th day of November, A. D. 1888.

[NOTARY SEAL.] ISAIAH HUNSBERGER,
Notary Public.

35 To Skillman & Mott, M. J. Gordon, Jenkins & Campbell, & John Perry, def'ts' att'ys:

You will please to take notice that the foregoing is a copy of the items of the costs and disbursements incurred in this action in the supreme court of Dakota, and that the same will be adjusted and taxed by the clerk of the supreme court of Dakota, at his office, in the city of Yankton, on the 26th day of November, A. D. 1888, at 10 o'clock a. m.

Yours, &c., JAMES WELLS,
Pl't'ff's Att'y.

Costs and disbursements as above, $81.40, taxed and allowed.

J. H. C. YOUNG, *Clerk.*

Done at Yankton, D. T., this 26th day of November, A. D. 1888.

(Endorsed:) No. 435. John E. Adams *vs.* Fred. B. Smith *et al.* In supreme court, Dakota. Notice of taxation of costs. Service of a copy of this notice is hereby admitted this 15th day of Nov., 1888. Skillman & Mott, M. J. Gordon, Jenkins & Campbell, & John H. Perry, def'ts' att'ys.

36 *Motion to Set Aside and Vacate Order Allowing Appeal.*

TERRITORY OF DAKOTA, } *ss:*
County of Brown, }

In Supreme Court of Dakota Territory. October Term, 1888.

JOHN E. ADAMS, Pl't'ff & Ap'll't,
vs.
FRED. B. SMITH, W. I. STEERE, E. J. MATHER, HORACE BARNARD, C. W. SWIFT.

And now comes John E. Adams, by C. S. Palmer, his attorney, and moves this hon. court to set aside and vacate the order made in open court on the 13th day of October, 1888, in the above-entitled cause, whereby the defendants herein were allowed an appeal to the Supreme Court of the United States in this action, and for the reason that said appeal was improvidently granted, no Federal question being involved and there being no law or act of Congress allowing or authorizing appeals in actions of this character, and for other reasons and irregularities apparent on the face of the record.

C. S. PALMER,
Att'y for John E. Adams.

(Endorsed:) No. 435. John E. Adams, plaintiff and appellant, *vs.* Fred. B. Smith, W. I. Steere, E. G. Mather, Horace Barnard, and C. W. Swift, as county commissioners, defendants and respondents. Motion to set aside and vacate order allowing appeal. Supreme court of the Territory of Dakota. Filed Nov. 30, 1888, 3.05 p. m. J. H. C. Young, clerk.

37 *Motion to Set Aside and Vacate Order Allowing Appeal.*

TERRITORY OF DAKOTA, *County of Brown:*

In Supreme Court of Dakota Territory. October Term, 1888.

JOHN E. ADAMS, Pl't'ff & Ap'll't,

vs.

FRED. B. SMITH, W. I. STEERE, E. J. MATHER, HORACE BARNARD, C. W. SWIFT, Def'ts.

And now comes Fred. B. Smith, E. J. Mather, and Horace Barnard, by C. S. Palmer, their attorney, and respectfully show to this court that they are three of the defendants and respondents in the above-entitled action; that this cause was regularly tried at the October term, 1888, of the supreme court of this Territory and by said court judgment was rendered against all of the defendants in the action and in favor of the plaintiff herein; that thereupon counsel for these defendants asked for and were allowed an appeal to the Supreme Court of the United States; that these defendants were then and are now the duly elected and qualified and acting board of county commissioners of said Brown county; that since said appeal was allowed by said supreme court of Dakota the undersigned, members of said board, have become satisfied that no farther proceedings should be had in said case, and, as the majority of said board, they requested and directed their attorneys in said action not to perfect any appeal in this case to the Supreme Court of the United States; that this was done before any bond on appeal was executed, approved, or filed and before any citations in the case were issued; which said bond on appeal, as executed, is signed by W. I. Steere and C. W. Swift only, of said board of county commissioners; 38 that said attorneys have entirely ignored and disregarded our instructions and are now attempting to perfect an appeal in said action in the Supreme Court of the United States.

Wherefore these defendants, Fred. B. Smith, E. J. Mather, and Horace Barnard, ask and move this court to set aside and vacate the order entered in this court on the 13th day of October, 1888, granting the appeal in this case to the Supreme Court of the United States, and for the following reasons:

First. Because the same was improvidently issued and granted, in this, that no Federal question was involved in said case and there is no law of Congress authorizing or allowing to these defendants an appeal in such action, and for other reasons and irregularities appearing upon the face of the record.

Second. Because a majority of said board of commissioners, being the said Fred. B. Smith, E. J. Mather, and Horace Barnard, appellants, do not desire said appeal and have so instructed their attorneys in the case, and hereby move this hon. court to set aside and vacate said order allowing said appeal and save these defendants and said county further trouble and expense in this proceeding.

By their att'y, C. S. PALMER.

(Endorsed:) No. 435. John E. Adams, plaintiff and appellant, *vs.* Fred. B. Smith, W. I. Steere, E. G. Mather, Horace Barnard, and C. W. Swift, as county commissioners, defendants and respondents. Motion to set aside and vacate order allowing appeal. Supreme court of the Territory of Dakota. Filed Nov. 30, 1888, 3.05 p. m. J. H. C. Young, clerk.

39 Supreme Court of the United States.

JOHN E. ADAMS, Plaintiff and Appellee,

vs.

FRED. B. SMITH, W. I. STEERE, E. J. MATHER, HORACE BARNARD, and C. W. SWIFT, as County Commissioners, Defendants and Appellants.

Know all men by these presents that we, Fred. B. Smith, W. I. Steere, E. J. Mather, Horace Barnard, and C. W. Swift, all of the county of Brown and Territory of Dakota, as principals, and H. M. Morple, Frank Beard, F. H. Hogerty, F. W. Brooks, R. A. Mills, and C. F. Easton, of said Brown county, Dakota Territory, as sureties, are held and firmly bound unto John E. Adams, the above-named plaintiff, in the sum of one thousand dollars, to be paid to the said John E. Adams, his executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves and each of ourselves, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 17th day of November, A. D. 1888.

40 Whereas the above-named Fred. B. Smith, W. I. Steere, E. G. Mather, Horace Barnard, and C. W. Swift have taken an appeal to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the supreme court of the Territory of Dakota on the 13th day of October, 1888:

Now, therefore, the condition of this obligation is such that if the above-named Fred. B. Smith, W. I. Steere, E. G. Mather, Horace Barnard, and C. W. Swift, principals, shall prosecute their said appeal to effect and answer to all costs and damages, including just damages for delay and costs and interest on appeal, if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and effect.

Witness our hands and seals the day and year aforesaid.

W. I. STEERE. [SEAL.]
—— ——. [SEAL.]
—— ——. [SEAL.]
C. W. SWIFT. [SEAL.]
H. M. MARPLE. [SEAL.]
FRANK BEARD. [SEAL.]
F. H. HOGERTY. [SEAL.]
F. W. BROOKS. [SEAL.]
R. A. MILLS. [SEAL.]
C. F. EASTON. [SEAL.]

Sealed and delivered in the presence of—
J. Q. A. BRADEN.
A. W. CAMPBELL.

TERRITORY OF DAKOTA,
County of Brown, } *ss:*

Be it remembered that on this 17th day of November, 1888, 41 personally appeared before me, J. Q. A. Braden, a notary public within and for said county and Territory, the above-named W. I. Steere, C. W. Swift, H. M. Marple, Frank Beard, F. H. Hogerty, F. W. Brooks, R. A. Mills, and C. F. Easton, well known to me to be the persons who are described in and whose names are subscribed to the foregoing instrument, and each duly acknowledged to me that he executed the same freely and voluntarily.

In witness whereof I have hereunto set my hand and notarial seal the day and year above written.

[NOTARY SEAL.] J. Q. A. BRADEN,
Notary Public, Brown County, Dakota.

TERRITORY OF DAKOTA,
County of Brown, } *ss:*

H. M. Marple, Frank Beard, F. H. Hogerty, F. W. Brooks, R. A. Mills, and C. F. Easton, being each first duly and severally sworn, deposes and says, each for himself and not one for the other, that he is one of the sureties in the foregoing bond; that he is a resident householder and freeholder in said county of Brown, in the Territory of Dakota, and that he is worth the sum of two thousand dollars over and above all his debts and liabilities in property subject to execution.

H. M. MARPLE.
FRANK BEARD.
F. H. HOGERTY.
F. W. BROOKS.
R. A. MILLS.
C. F. EASTON.

Subscribed and sworn to before me this 17th day of November, A. D. 1888.

[NOTARY SEAL.] J. Q. A. BRADEN,
Notary Public, Brown County, Dakota.

42 TERRITORY OF DAKOTA, } *ss:*
County of Brown, }

I, Louis W. Crafoot, associate justice of the supreme court of Dakota Territory and judge of the seventh judicial district, in which said Brown county is situated, do hereby certify that I am well acquainted with H. M. Marple, Frank Beard, F. H. Hagerty, F. W. Brooks, R. A. Mills, and C. F. Easton, sureties on the foregoing appeal bond in the case of John E. Adams, plaintiff and appellee, *vs.* Fred. B. Smith, W. I. Steere, E. G. Mather, Horace Barnard, and C. W. Swift, as county commissioners, defendants and appellants; that I know that each is a freeholder and a resident of said county of Brown, in Dakota Territory, and I consider each of them worth the amount for which he has qualified in said bond over and above all his debts and liabilities and exclusive of exemptions allowed by law, and that they are amply good and sufficient sureties on said bond on appeal.

Witness my hand this 17th day of November, 1888.

LOUIS W. CRAFOOT,
Asso. Justice Supreme Court & Judge 7th Jud'l Dist., D. T.

I approve the foregoing bond and the sufficiency of the sureties thereto this 30th day of November, A. D. 1888.

BARTLETT TRIPP,
Chief Justice of the Supreme Court of Dakota Territory.

(Endorsed:) Supreme Court United States. John E. Adams, pl'ff & appellee, *vs.* Fred. B. Smith *et al.*, def'ts & appellants. Bond. Supreme court of the Territory of Dakota. Filed Dec. 1, 1888. J. H. C. Young, clerk.

43 The United States of America to John E. Adams, appellee, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, 1889, next, pursuant to an appeal filed in the clerk's office of the supreme court of Dakota Territory, wherein you, John E. Adams, are plaintiff and appellee and Fred. B. Smith, W. I. Steere, E. G. Mather, Horace Barnard, and C. W. Swift, county commissioners, are defendants and appellants, to show cause, if any there be, why the judgment rendered in said supreme court of Dakota Territory against the said appellants, as in the said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the

Supreme Court of the United States, this 30th day of November, in the year of our Lord one thousand eight hundred and eighty-eight.

BARTLETT TRIPP,
Chief Justice of the Supreme Court of Dakota Territory.

(Original citation also filed with these papers.)

44 TERRITORY OF DAKOTA, *County of Yankton,* } *ss:*

J. Q. A. Braden, being duly sworn, deposes and says that he is over the age of twenty-one years and a resident of Brown county, Dakota Territory, and not a party in interest herein, and that on the 11th day of December, A. D. 1888, at Columbia, Brown county, Dakota Territory, he served the annexed citation in the case of John E. Adams against Fred. B. Smith *et al.*, by delivering to and leaving with James Wells, Esq., personally a true copy of the same.

Deponent further says that he knows the said James Wells, Esq., to be one of the attorneys for the above named John E. Adams, appellee above named.

J. Q. A. BRADEN.

Subscribed and sworn to before me this 11th day of December, A. D. 1888.

[NOTARY SEAL.] JNO. P. CRENNAN,
Notary Public, Dak.

Filed December 12, 1888.

J. H. C. YOUNG,
Clerk of the Supreme Court,
By E. G. EDGERTON, *Deputy.*

45 By the Hon. Bartlett Tripp, chief justice of the supreme court of Dakota Territory.

To John E. Adams:

Whereas Fred. B. Smith, W. I. Steere, E. G. Mather, Horace Barnard, and C. W. Swift, county commissioners, have lately appealed to the Supreme Court of the United States from a judgment lately rendered in the supreme court of the Territory of Dakota, rendered and entered in favor of you, the said John E. Adams, and against said appellants, and have filed the security required by law, you are therefore hereby cited to appear before the said Supreme Court, at the city of Washington, on the 2nd Monday of October next to do and receive what may pertain to justice to be done in the premises.

Given under my hand, at the city of Yankton, in the second judicial district of Dakota Territory, the 30th day of November, in the year of our Lord one thousand eight hundred and eighty-eight.

BARTLETT TRIPP,
Chief Justice of the Supreme Court of Dakota Territory.

(Original citation also filed with these papers.)

46 TERRITORY OF DAKOTA, *County of Yankton*, } *ss:*

J. Q. A. Braden, being duly sworn, deposes and says that he is over the age of twenty-one years and a resident of Brown county, Dakota Territory, and not a party in interest herein, and that on the 11th day of December, A. D. 1888, at Columbia, Brown county, Dakota Territory, he served the annexed notice and citation in the case of John E. Adams against Fred. B. Smith *et al.* by delivering to and leaving with James Wells, Esq., personally a true copy of the same.

Deponent further says that he knows said James Wells, Esq., to be one of the attorneys for the above-named John E. Adams, appellee above named.

J. Q. A. BRADEN.

Subscribed and sworn to before me this 11th day of December, A. D. 1888.

[NOTARY SEAL.]

JNO. P. CRENNAN,
Notary Public, Dak.

Filed December 12th, 1888.

J. H. C. YOUNG,
Clerk of the Supreme Court,
By E. G. EDGERTON, *Deputy.*

47 *Appeal.*

In the Supreme Court of Dakota Territory.

JOHN E. ADAMS, Plaintiff and Appellee,

vs.

FRED. B. SMITH, W. I. STEERE, E. G. MATHER, HORACE BARNARD, and C. W. SWIFT, as County Commissioners, Defendants and Appellants.

The above-named Fred. B. Smith, W. I. Steere, E. G. Mather, Horace Barnard, and C. W. Swift, as county commissioners, defendants and appellants, feeling themselves aggrieved by the final judgment and decree of the supreme court of the Territory of Dakota, made and entered on the 13th day of October, A. D. 1888, in the above-entitled cause, do hereby appeal therefrom to the Supreme Court of the United States, and they pray that their appeal may be allowed, and that a transcript of the record, proceedings, bill of exceptions, judgment, &c., in said cause duly authenticated may be sent to the Supreme Court of the United States.

Dated Deadwood, Dakota, November 1st, 1888.

G. C. MOODY,
Attorney for Defendants and Appellants.

48 The foregoing appeal is allowed by me and was allowed in open court by the superior court of Dakota Territory at a

term thereof held at the city of Deadwood, in said Territory, on Saturday, the thirteenth day of October, A. D. 1888, and the appellant's bond, with sufficient sureties, was fixed by the court at the same time in the sum of one thousand dollars, which bond has been given accordingly, and I have this day approved the same.

Done at Yankton, in said Territory, this 30th day of November, 1888.

BARTLETT TRIPP,
Chief Justice of the Supreme Court of Dakota Territory.

49 In the Supreme Court of the United States.

JOHN E. ADAMS, Appellee,
vs.
FRED. B. SMITH, W. I. STEERE, E. G. MATHER, HORACE BARNARD, and C. W. SWIFT, as County Commissioners, Appellants.

TERRITORY OF DAKOTA,
7th Judicial District, County of Brown, } *ss:*

A. W. Campbell, being first duly sworn, sayeth that he is a resident of Brown county, in Dakota Territory; that on the 12th day of December, 1888, at Columbia, in said Brown county and district, he served on above-named appellee, John E. Adams, a true copy of the appeal and the order allowing the same, filed in this cause with the clerk of the supreme court in and for the Territory of Dakota, by delivering said copy of the appeal and order to James Wells personally, the attorney of record for the said appellee.

A. W. CAMPBELL.

Subscribed and sworn to before me this 12th day of December, A. D. 1888.

[NOTARY SEAL.] M. T. CORWIN,
Notary Public, Brown County, Dakota.

(Endorsed:) Supreme court, Dakota Territory. J. E. Adams, pl'ff & appellee, *vs.* Fred. B. Smith *et al.*, def'ts & appellants. Appeal. Supreme court of the Territory of Dakota. Filed Dec. 13, 1888. J. H. C. Young, clerk.

50 *Cause.*

UNITED STATES OF AMERICA,
Territory of Dakota, } *ss:*

In Supreme Court.

JOHN E. ADAMS, Plaintiff and Appellant,
vs.
FRED. B. SMITH, W. I. STEERE, E. J. MATHER, HORACE BARNARD, and C. W. SWIFT, as County Commissioners, Defendants and Respondents.

Filed August 23, 1888.

Journal Entries.

UNITED STATES OF AMERICA, } *ss:*
Territory of Dakota,

In Supreme Court. October Term, A. D. 1888.

Tuesday, October 2, 1888, being the first day of the term.
On call of calendar.

In JOHN E. ADAMS, Plaintiff and Appellant,
vs.
FRED. B. SMITH, W. I. STEERE, E. J. MATHER, HORACE BARNARD, and C. W. SWIFT, as County Commissioners, Defendants and Respondents. } 435.

51 Counsel answers ready.

UNITED STATES OF AMERICA, } *ss:*
Territory of Dakota,

In Supreme Court. October Term, A. D. 1888.

Thursday, October 4, 1888, being the third day of the term.

In JOHN E. ADAMS, Plaintiff and Appellant,
vs.
FRED. B. SMITH, W. I. STEERE, E. J. MATHER, HORACE BARNARD, and C. W. SWIFT, as County Commissioners, Defendants and Respondents. } 435.

Motion to dismiss appeal presented by G. C. Moody, Esq., for respondents.

The court orders motion to be argued with cause.

Cause argued by James Wells, Esq., for appellant, and C. S. Palmer, Esq., for appellant; G. C. Moody, Esq., for respondent.

Submitted to the court.

52 UNITED STATES OF AMERICA, } *ss:*
Territory of Dakota,

In Supreme Court. October Term, A. D. 1888.

Saturday, October 13, 1888, being the eleventh day of the term.

In JOHN E. ADAMS, Plaintiff and Appellant,
vs.
FRED. B. SMITH, W. I. STEERE, E. J. MATHER, HORACE BARNARD, and C. W. SWIFT, as County Commissioners, Defendants and Respondents. } 435.

Judgment of the district court within and for Brown county reversed.

G. C. Moody, Esq., counsel for defendants, asks to be allowed appeal to the Supreme Court of the United States.

Appeal allowed and bond fixed at one thousand dollars.

53 IN SUPREME COURT, *Territory of Dakota,* } *ss:*

I, James H. C. Young, clerk of the supreme court within and for the Territory of Dakota, do hereby certify that the above and foregoing is a true and correct transcript and copy of papers filed in the supreme court of the Territory of Dakota in the above-entitled action, wherein John E. Adams is plaintiff and appellant *versus* Fred. B. Smith, W. I. Steere, E. G. Mather, Horace Barnard, and C. W. Swift, as county commissioners, defendants and respondents, as the same appeared of record in this cause at the date of issuing citation and approval of supersedeas bond herein and as the same now remains of record in said court, together with copies of the journal entries of the supreme court of the Territory of Dakota, so far as the same relates to said cause; also that the citations herewith are the original citations issued by said supreme court of the Territoy of Dakota.

In witness whereof I have hereunto set my hand and affixed the seal of the said court this 29th day of January, A. D. 1889.

[Seal Supreme Court of Dakota Territory.]

J. H. C. YOUNG, *Clerk.*

Endorsed on cover: Dakota Territory supreme court. No. 1498. Fred. B. Smith, W. I. Steere, E. G. Mather, Horace Barnard, and C. W. Smith, county commissioners, appellants, *vs.* John E. Adams. Filed February 11, 1889.

Office Supreme Court, U. S.
FILED
MAR 2 1889
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM 1888.

No. 1498.

JOHN E. ADAMS, Respondent,

vs.

FRED. B. SMITH, E. J. MATHER, W. I. STEERE, HORACE BARNARD, and C. W. SWIFT, County Commissioners, Appellants,

BRIEF FOR APPELLANTS IN RESISTANCE OF MOTION TO DISMISS.

By SAMUEL SHELLABARGER and
J. M. WILSON.

Thomas McGill & Co., Printers, Washington, D. C.

Office Supreme Court, U.S.
FILED
MAR 2 1889
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM 1888.

No. 1498.

JOHN E. ADAMS, Respondent,

vs.

FRED. B. SMITH, E. J. MATHER, W. I. STEERE, HORACE BARNARD, and C. W. SWIFT, County Commissioners, Appellants,

BRIEF FOR APPELLANTS IN RESISTANCE OF MOTION TO DISMISS.

By SAMUEL SHELLABARGER and
J. M. WILSON.

THOMAS McGILL & Co., Printers, Washington, D. C.

IN THE

Supreme Court of the United States.

JOHN E. ADAMS, RESPONDENT,

vs.

FRED. B. SMITH, E. J. MATHER, W. J. STEERE, HORACE BARNARD, AND C. W. SWIFT, COUNTY COMMISSIONERS, APPELLANTS.

Brief in Resistance of Motion to Dismiss.

I.

The present suit although based upon a statute of a territory is, notwithstanding, within the constitutional signification of the words "cases, controversies, suits," as employed in the constitutional provisions defining the jurisdiction of the Federal Courts. On this point 2 Story on the Constitution, section 1646, says:

> "It is clear that the judicial department is authorized to exercise jurisdiction to the full extent of the Constitution, laws, and treaties of the United States, whenever any question respecting them shall assume such form that the judicial power is capable of acting upon it. When these assume such form, it then becomes a case; and then, and not till then, the judicial power attaches to it. A case, then, in the sense of this clause of the Constitution arises when some subject touching the Constitution, laws, or treaties of the United States is submitted to the courts by a party who asserts his rights in the form prescribed by law."

This is, in substance, a quotation from Chief Justice Marshall's opinion in—

Osborn *et als. v.* The Bank of the United States, 9 Wheat., 819, where the Chief Justice says:

> "This clause enables the judicial department to receive jurisdiction to the full extent of the Constitution, laws, and treaties of the United States when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the Constitution declares that the judicial power shall extend to all cases arising under the Constitution, laws, and treaties of the United States."

And see Justice Field, 32 Fed. Rep., 260, 264, 265.

The fact, therefore, that this is a case arising upon a statute does not take it outside of this definition. On the contrary, it brings it expressly within the definition, because it is a proceeding where a party "asserts his rights in the form prescribed by law."

II.

The next point which we shall notice, and made by the appellee's brief, relates to the question whether the matter in dispute, exclusive of costs, exceeds in this case the sum of five thousand dollars. In other words, whether the controversy here is about a matter which brings the case within the requirement that "in order to give the Supreme Court appellate jurisdiction under this section the matter in dispute must be money, or some right the value of which, in money, can be estimated and ascertained," as laid down, by this court, in various cases such as—

Barrey *v.* Marcian, 5 Howard, 403.

Kurtz *v.* Moffett, 105 U. S., 495, and various other cases.

In determining this question whether the present case, involving the change of a county seat, puts in dispute a matter of property value equal to five thousand dollars, it is proper to observe that it is not essential, in order that a property value shall be in dispute, that the principal consequences of the suit is gain or loss of property capable of estimation in money value.

This is well illustrated in the case of

Smith *v.* Whitney, 116 U. S., 173,

where objection was made that the proceeding for a writ of prohibition restraining proceedings against an officer by court-martial, and where the officer's salary for a term was worth over the jurisdictional sum, was not within the appellate jurisdiction of this court, because the subject-matter of the suit was incapable of estimation in money value. The court replied to this that "the matter in dispute is whether the petitioner is subject to a prosecution which *may* end in a sentence dismissing him from the service, and depriving him of a salary as paymaster-general during the residue of his term as such, and as pay-inspector afterwards, which in less than two years would exceed the sum of five thousand dollars."

See also cases cited in Justice Field's opinion in Sharon *v.* Terry.

In this case of Smith *v.* Whitney, and those there by this court cited, the thing in dispute was the right to the *office.* Incidentally this right to the office involved, also, the right to the property in the salary. So precisely in the present case, the question involved is the removal of the county seat, but directly as a result of the removal of the county seat the county, and all its people, lose the grant described in the affidavit and deed (not printed, as it ought to have been, in the Record, yet a part thereof, and on file in this case), and of which affidavit and deed the following is a copy:

In the Supreme Court of the United States.

JOHN E. ADAMS, Plaintiff and Appellee,
vs.
FRED. B. SMITH, W. I. STEERE, E. J. MATHER, HORACE BARNARD, and C. W. SWIFT, as County Commissioners, Defendants and Appellants.

TERRITORY OF DAKOTA, *County of Brown.* } *ss.*

W. I. Steere and C. W. Swift, being first duly and severally sworn, each for himself says, and not one for the other: that he is a resident of Brown county, in said Territory of Dakota, and is one of the defendants in the Supreme Court of the Territory of Dakota, in which John E. Adams was plaintiff, and Fred. B. Smith, W. I. Steere, E. J. Mather, Horace Barnard, and C. W. Swift, as County Commissioners, were defendants, and wherein at the October term of said court, A. D. 1888, the judgment of the District Court, within and for Brown county, Dakota Territory, was reversed, and a final judgment entered therein in said Supreme Court; that said judgment in said Supreme Court still remains in full force and wholly unsatisfied; that the value and amount of the property and matter in dispute in said action, exclusive of costs, at the time of the rendition of said judgment in said District and Supreme Courts, and at the present time, exceeds the sum of five thousand dollars; that by the enforcement of said judgment of said Supreme Court the said county of Brown, in whose interest this suit is defended, will lose real property now belonging to it situated in the city of Aberdeen, in said county, in value largely exceeding five thousand dollars, to wit, of the value of ten thousand dollars, by said property reverting to the persons and parties who conveyed the same to said county of Brown upon certain conditions, which will be broken by the enforcement of said judgment. Which facts with reference to said loss of property by said Brown county more fully appear on the public records of the register of deeds' office of said county, and by the deed on conveyance, a copy of which is hereto attached.

C. W. SWIFT.
W. I. STEERE.

Subscribed and sworn to before me this seventeenth day of November, A. D. 1888.

[SEAL.] J. Q. A. BRADEN,
Notary Public, Brown County, Dakota.

THIS INDENTURE, made the twenty-seventh day of June, in the year of our Lord one thousand eight hundred and eighty-seven, by and between the *city of Aberdeen*, of the county of Brown, in the Territory of Dakota, *party of the first part*, and *Brown county*, of the county of Brown, in the Territory of Dakota, *party of the second part:*

WITNESSETH: That the said party of the first part, for and in consideration of the sum of one dollar to it in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, and conveyed, and by these presents does grant, bargain, sell, and convey unto the said party of the second part, and to its successors forever, all that certain piece or parcel of land situate in the county of Brown and Territory of Dakota, described as follows, to wit, block seven (7), North Aberdeen, in the city of Aberdeen, and the building now being erected thereon, *so long as the same shall be used by the party of the second part for court-house, but whenever it ceases to be used for that purpose it shall revert to the party of the first part, together with all and singular the heriditaments and appurtenances thereunto belonging or in any wise appertaining.*

TO HAVE AND TO HOLD, the said premises with the appurtenances to the said party of the second part, its successors forever. And the said city of Aberdeen for itself and its successors, does covenant and agree to and with the said party of the second part, its successors, that it is well seized in fee of the lands and premises, aforesaid, and has good right and lawful authority to sell and convey the same in manner and form aforesaid. And that the same are free from all encumbrances whatsoever.

And further that the said party of the first part, for itself and its successors and all and every other person lawfully claiming, or to claim, by, from, or under him or them, shall and will, from time to time and at all times hereafter, make and execute, or cause and procure to be made and executed, all such other deed or deeds whatsoever for the further and more perfect assurance and confirmation of the said premises hereby granted, with the appurtenances, unto the said party of the second part, its successors, as it shall be required; and the above granted premises in the quiet and peaceable possession of the said party of the second part, its successors against all persons claiming or to claim the same, or any part thereof, the said party of the first part, its successors, will warrant and forever defend.

IN WITNESS WHEREOF, the said party of the first part has caused this instrument to to be executed by the Mayor of the city of Aberdeen, and attested by the clerk thereof, and the official seal attached, the day and year first above written.

THE CITY OF ABERDEEN, [SEAL.]
By R. A. MILLS, *Mayor.* [SEAL.]
C. A. OUTCELT, *Clerk.* [SEAL.]

Signed and delivered in the presence of
J. H. HAUSER.
W. P. BUTLER.
Attest.

[CORPORATE SEAL DAKOTA,
CITY OF ABERDEEN.]

TERRITORY OF DAKOTA, *County of Brown.* } *ss.*

Be it remembered that on this the twenty-seventh day of June, in the year 1887, before me, John H. Perry, a notary public within and for said county and Territory, personally appeared R. A. Mills, known to me to be the Mayor of the city of Aberdeen that is described in and who executed the within and foregoing instrument and severally duly acknowledged to me that for said consideration, executed the same freely.

In witness whereof I have hereunto set my hand and official seal of said county, the day and year above written.

JOHN H. PERRY,
[SEAL.] *Notary Public.*

[Endorsed]: Territory of Dakota, county of Brown, ss.; office of register of deeds. I certify the within instrument was filed for record the twenty-eighth day of June, A. D., 1887, at five o'clock and thirty minutes P. M., and recorded in Book 20, on page 450, of the records of said register of deeds' office for said county. By Register of Deeds, through his Deputy.

It is proper also to observe that the fact that no one citizen of the county can be said to have an interest in the property covered by the foregoing deed equal to five thousand dollars is immaterial. The interest of the entire body of the people of Brown county arises out of a *joint*, as distinguished from a *severable* or several title, and in such cases if the aggregate interest equals the jurisdictional amount then the jurisdiction of this court exists.

See Friend *v.* Wise, 111 U. S., 797.
Davies *v.* Corbin, 112 U. S., 36–40.
Shields *v.* Thomas, 17 Howard, 5.
Connemara, 103 U. S., 754.

Leaving wholly out of view any values which may be involved outside of the property covered by the above-named deed, it is quite plain that to the people of the county, and the county itself, property covered by the said deed is as necessarily involved in this suit as is the salary of an officer who is proceeded against by *quo warranto*, or the like, for the purpose of turning him out of office. The question involved in that case is the right to hold the office, the *honors* of which may be, in value, much greater than the mere matter of salary; but since the *salary* is also incidentally involved, this court holds that the salary is in dispute, although not one word is said about salary in the pleadings or proceedings.

III.

The next point to be noticed is the alleged effect of the resolution of the 3d of December, 1888, by three of the County Commissioners, directing the attorneys to abandon the appeal to this court. In regard to the effect of this resolution upon the right of the other Commissioners to prosecute the appeal, the followings things are to be observed:

1. That it appears by the Record that *all* of the Commissioners united in taking the appeal, and when all were so united the court allowed the appeal.

2. That the three Commissioners whose resolution is now interposed to defeat the appeal made to the court a motion to dismiss the appeal, based upon their said resolution, which was overruled; and under the direction of the court the appeal was perfected and citation issued in the name of all the parties taking the appeal, to wit, all the Commissioners.

3. That this is a case where the Commissioners were not parties *defendant*, technically so called; but where, by the statute, a majority of them are required to be served with notice of the appeal; the same statute providing that if they fail to make a defense, then "any elector," on leave of the court, may make the defense. Hence it was not in the power of the Commissioners to control this defense. Neither the county nor the Commissioners are parties defendant as such. The proceeding is statutory, and in so far as the Commissioners are authorized to defend, they, as a matter of convenience, are

selected, by the statute, to make the defense in behalf of all the electors; and, failing, *any elector*—and certainly the two Commissioners—are authorized to continue the defense after the defense had been abandoned by the other Commissioners.

4. Under the chancery practice any person, even though not technically a party to the Record, has a right to become a party and to take an appeal in a case where his interests are to be affected by the decree. (See Daniel's Chancery, vol. 2, pp. 1460–61, and cases cited.)

5. This whole point, made by the appellee's brief, that all the Commissioners must unite in the appeal, and that there was in this case no severance attempted, either in the judgment or subsequent summons and severance, or any other proceeding is, in principle, covered by the case of Todd *v.* Daniel, 16 Pet., 521, where the matter decided is expressed in the syllabus in these words:

> "Motion to dismiss an appeal. The appellants were the original defendants. After a decree of the Circuit Court, an appeal was claimed by the defendants and allowed by the court." (Precisely as in the case at bar.) "A part of the defendants, who had originally claimed the appeal, before any further proceedings, abandoned it, and the residue of them, excepting Todd, have, since the appeal was filed, abandoned it, and Todd only has entered his appearance in the Supreme Court. The Record stood in the name of the appellants. A motion was made to dismiss the appeal, for irregularity and want of jurisdiction, on the ground that it cannot be maintained in behalf of Todd alone."

The court refused to dismiss the appeal.

In this case the court says the usual practice is to serve a notice on the parties refusing to appeal, and make an order of severance; but proceeds to say that what had occurred in that case was equivalent to such notice and severance. On this point the court, in the body of the opinion, remarks:

> "*All* the defendants originally claimed an appeal; some of them have declined to pursue it at all; others have deserted it since it was pending in this court; and, therefore, there is no pretence to say that any particular inconvenience can occur from Todd's now prosecuting alone, and *since the other defendants have all had notice and declined to interfere and are contented to abide by the original decree.*"

In view of these suggestions it is, we submit, quite plain that this case, although statutory in its foundations, is quite analogous to that familiar class where one or more persons may sue for, and as representatives of, a large class; and where, likewise, the defense contemplated can be made by any one or more of the people in the interest of the public; and where the members thereof are alike affected by the pending suit, and where it is not within the power of any one or more of the defendants to defeat the defense of the public interest by his withdrawal from such defense. In all such cases, prosecuted in the interest of the public, or of large classes, *the court will see to it that the parties are present in the Record which are necessary to the proper presentation of the case, both for the prosecution and the defense.*

On this point this court says (McArthur *v.* Scott, 113 U. S., 395):

> "And where a suit is brought by or against a few individuals as representing a numerous class, that fact must be alleged of record"—(as is fully done in this case disclosing the character of the case)—"*so as to present to the court the question whether sufficient parties are before it to properly represent the rights of all.* (Lanchester *v.* Thompson, 5 Madd., 13; Calvert on Parties, 44, 169.)"

This whole matter as to the number of the representatives, of a class too numerous to be made parties, who shall be made parties, and as to the *control* which such representatives shall be permitted to exercise over the case, is under the control of the court. (See Hallett *v.* Hallett, 2 Paige R., 18 to 21, and cases cited.)

Therefore it was not competent for the three Commissioners to defeat the defense of the public, in the present case, by their withdrawal from such defense. It was not the county, or its Commissioners, that was defendant—it was the entire body of the people of the county, about two-thirds of whom had voted for this change of the county seat.

We repeat that it will be observed by the foregoing—especially by the citation from the cases of McArthur and Hallett, *supra*—that in these cases where the public are, in legal effect, parties, the *care and judicial discretion of the court* is exercised in deciding upon the presence of the proper parties, and seeing to it that the public are fully and judiciously represented.

It will be moreover seen that, in this case, the court below has exercised that care—

First. In refusing, on the motion of the appellee, Adams, to dismiss the appeal on the ground that three of the Commissioners refused to prosecute the appeal.

Second. In perfecting the appeal, issuing the writ of citation, &c., after this motion to dismiss the appeal had been overruled.

IV.

The next and only other material point presented by the brief in support of the motion to dismiss is the one based on the act of Congress of the 30th of July, 1886, (24 Stats., 170,) and which, so far as such act affects the present case, is cited with substantial accuracy in appellee's brief, pages 1 and 2.

The motion to dismiss states several grounds which it is not necessary to here notice, such as that this case "presents no Federal question." It will also be observed that the motion to dismiss does not suggest, as a ground for the motion, that the legislation under which the vote to change the county seat to Aberdeen was taken was in contravention of the said act of the 30th of July, 1886—that whilst the motion itself ignores that ground for dismissing, yet it is the principal point discussed in the appellee's brief.

The grounds upon which appellee asserted below, and asserts here, that the said act of Dakota Territory of the 11th March, 1887, under which said vote, changing the county seat to Aberdeen was taken, is void, is that such act is a "special or local" law, owing to the prohibition in said act of Congress. These grounds are stated in paragraph 10 on page 7 of the opposing brief.

That ground, in substance, is that this Brown county, at the time of the passage of said act of 11th of March, had a population, by the census of 1885, of twelve thousand, and, also, had an area of at least forty-eight Congressional townships, and in it, also, the county seat had been temporarily located under provisions of section 4, chapter 21 of the Political Code, and had remained a county seat under the provisions of section 6 of said Political Code, by reason of a failure to receive a majority of the votes cast at an election held under said section 6 of the Political Code, and was the *only* county to which the said act of the 11th of March could apply.

Section 4 of Chapter 21 of the Political Code is as follows:

"The County Commissioners, appointed under this act, shall have the power to *locate the county seat of such county temporarily*, and shall divide the county into three commissioner districts, which shall be numbered from one to three, and said districts shall not be changed oftener than once in three years, and then only at the regular session in January, April, or July, and one commissioner shall be elected from each of the said districts at the next general election after such organization, one of whom shall be chosen for the term of one year, one for two years, and the third for three years, and one annually thereafter as provided by law."

Section 6 of Chapter 21 of said Political Code is:

"When any county shall be organized as herein provided the qualified electors thereof are hereby empowered to *select the place of the county seat, by ballot, at the first general election at* which the county officers are chosen, and for this purpose each voter may designate on his ballot the place of his choice for the county seat; and when the votes are canvassed the place having the majority of all votes polled shall be the county seat; and public notice of said election shall be given within thirty days by the County Commissioners, by posting up notices at three several places in each precinct in the county; and if no one place voted for shall have a majority of all the votes cast, the place as located temporarily by the County Commissioners shall remain the county seat until changed, as provided in the next section."

The amended section one of the said act of the 11th of March, 1887, under which said vote, changing the county seat, was held, is accurately set forth at pages 4 and 5 of the opposing brief, and, therefore, need not be here reinserted.

The provisions of the act of 1885, chapter 54, under which the appellee, Adams, prosecuted the present suit, are, in substance, as follows:

The first section provides the manner in which the parties desiring to contest an election for county officers shall make the contest, by giving notice, &c.

The second section provides for the answer of the party receiving the notice of contest.

The third section provides that these contests may be by any candidate in his own name, or by an elector on notice to the District Attorney, &c.

The fourth section provides the mode of trial in court.

The fifth section provides for the taking of testimony, &c., as in civil actions.

The sixth section is in the following words, and is the one under which Adams' suit is prosecuted:

> "In any county where there is a vote for an election or for the removal or changing of the county seat of such county, or changing the county lines of such county, any elector thereof, on leave of the District Court, or the judge, may contest the validity of such election as to the right of the point declared and selected as the county seat, or as to any county line declared to be established or changed by a vote; such elector shall give notice in writing of such contest to the County Commissioners, or a majority of them, of the county in which the said vote was taken, by serving notice of contest as provided in section 1 of this act within thirty days after the result of the said vote is canvassed. Said notice shall specify the points on which such election will be contested, and said notice shall be filed with the clerk of the District Court where such court is held, for the judicial subdivision of which said county forms a part, within ten days after the service of the said notice upon the County Commissioner, as aforesaid, and the said contest shall be tried and determined by the District Court or judge thereof, or by a jury, as provided for in this act in the contest of county officers; such County Commissioners shall appear and defend said contest and put in an answer to the said notice as provided for in section 2; but if they fail to appear and defend said contest, any elector of the said county, at any time before said trial, may, on leave of the court or judge, appear and defend said contest; and all testimony and depositions shall be taken in the same manner as in civil actions."

The seventh section authorizes the reference of contest to referee.

The eighth section requires security for costs from parties prosecuting.

The ninth section authorizes appeals from any final decision of the District Court to the Supreme Court of the Territory, as provided in the Civil Code in other appeals.

The tenth section also provides for appeals to the Supreme Court; that they must be taken within sixty days; transcript must be sent up, and that the Supreme Court at any time when in session may determine the case summarily.

The eleventh section provides that this contest shall not be construed to affect any rights of action provided for in the Civil Code.

The twelfth and thirteenth sections relates to the methods of trial.

These provisions of the statute now alluded to, and, so far as essential to the question now to be considered, set forth either in the brief of the appellee or in the foregoing, in *hæc verba,* will enable the court to determine whether, for the reasons set forth in paragraph 10, page 7 of the opposing brief, this vote changing the county seat to Aberdeen is rendered void by the said act of Congress of the 3d of March, 1886, which prohibits the Territorial Legislature from passing any "local or special laws in any of the following enumerated cases—that is to say, * * * Locating or changing county seats."

This position asserting that the said act of the 11th of March, 1887, under which the vote was taken locating the county seat at Aberdeen, is a statute locating or changing a county seat passed by a Territorial Legislature in contravention of said act of Congress of July 30th, 1886, is a proposition going directly to the *merits* of this case, and is not a matter which this court, under paragraph 5 of its Rule 6 can consider, in disposing of this motion to dismiss and *affirm* the judgment of the court below, unless "it is *manifest* that the writ of error or appeal was taken for delay only, or that the question on which the jurisdiction depends is so *frivolous* as not to need further argument."

Regarding the proposition of the appellee that this court ought to cut the appellants off from all argument of the case on the merits, such as is accorded in all other cases not frivolously prosecuted here, it is proper to suggest to the court two or three matters somewhat preliminary. One of these preliminary suggestions is that this is not, on its merits, and in its importance, a frivolous case; that, on the contrary, it is a case involving immensely important interests of one of the largest counties in this great and flourishing Territory, about to become a State, to wit, the location of the county's seat of government. This, therefore, is not a matter which the court will, without that usual hearing accorded in all like cases, dispose of as trifling in its magnitude.

Again, this is a matter in which, as the present Record shows, the people of that county have felt a deep interest; and an immense majority of them have expressed that interest by voting for the county seat which this motion to dismiss says is to be disposed of as trifling or frivolous, and without hearing these people.

Again, to dispose of this question, regarding the alleged conflict of said amended section 1 of the act of 11th of March, 1887, under which Aberdeen was voted to be the county seat, with said act of Congress of the 30th of July, 1886, without that usual oral discussion accorded to suitors generally in this court, would be a denial of a hearing which is, under the practice and decisions of this court, universally accorded in such cases as the present.

Bonham *v.* Nebraska, 118 U. S., 231.
Hacker *v.* Fowler, 1 Black., 95.
Davies *v.* Corbin, 113 U. S., 688–89.
Gay *v.* Parport, 101 U. S., 391.

With these preliminary suggestions, and not waiving anything by our presentation of some considerations showing that this appeal is not only not frivolous, within the sense of paragraph 5 of Rule 6, and within that of your decision in Micas *v.* Williams, 104 U. S., 556, we now turn to the direct question whether said amended section 1 of the act of 11th of March, 1887, under which the county seat was moved to Aberdeen (see this section on pages 4 and 5 of the appellee's brief), is indeed rendered void by said act of Congress of the 30th of July, 1886, cited on the first page of the opposing brief.

Stated another way, our question now is whether said section 1, under which said vote was taken, is an act wherein the Territorial Legislature has, by an exercise of the mind and choice of the Legislature, located or changed a county seat.

We submit that to bring this question last stated to this court, by the present appeal, is so far from being a frivolous appeal, that it may, in all fairness, be said of it that the error of the court below, in holding this amended section 1 to be prohibited and rendered void by said act of Congress, is manifest error.

The reason why we say it is manifest error is simply this: that this Territorial law (said section 1) does not attempt to *locate* a county seat by the act and choice of the Legislature.

Please carefully observe what that thing is which this act of Congress prohibits. The language of the section is (24 Stats., 170): "That the Legislature of the Territories of the United States, now or hereafter to be organized, shall not pass local or special laws in any of the following enumerated cases, that is to say," * * * "LOCATING OR CHANGING county seats."

Now it is impossible to make plainer, by comment, than it is made by a simple reading of these words, that an act of the Territorial Legislature regarding the location of county seats is not within this prohibition, unless the territorial law is one which results, by its own operation and vigor, in "locating or changing the county seats."

This act happens to be one where ambiguity, uncertainty, confusion, and doubt, regarding its meaning, seems to be absolutely excluded. This is so partly because the word "*locate*," this being the controling word in this part of the statute, is one whose meaning is never doubtful. The meanings assigned to it, whether by the understanding of the people, by its use in law, or by its lexicographical signification, is invariable, and simply means "to place," "to set," "fix, or establish in a place or situation," "to designate and determine the place of." (Worcester.) And ambiguity is further excluded by the fact that the law explicitly provides that the special legislation which is prohibited by the act of the 30th of July, is legislation wherein the *law itself* undertakes to, and does, accomplish and consummate the fact of designating and determining the place of the county seat. It is the *statute* that must designate this place in order to bring such statute within the congressional prohibition, and is not some action of the people performed under the statute in making said selection. The statute prohibited by the congressional act is not declared to be a statute "*for* locating," nor one "providing for locating," nor one "providing for the people's locating by vote;" but the statute prohibited is one which, by its own action and vigor, accomplishes or consummates the location.

Stated in another way, it is palpable and express that the effect and operation of the law itself, which comes within the congressional prohibition, must be one which locates or changes the location of a county seat; one in which the legislative mind is brought to a choice touching the place or point where the county seat shall reside, and where such mind, as embodied in a law, actually and directly does make and complete that choice.

For illustration and example, turn to paragraph 6, page 4, of the opposing brief, and you will find there noticed an act of the Legislature which would, if not older than said act of Congress, come within the prohibition of this act of Congress, where it is said "that the county seat of Cass county was located at Fargo, in the said county, by the *direct* vote of the Territorial Legislature, approved January 4th, 1873."

This act of Congress is, therefore, not one prohibiting the Territorial Legislatures from making either local or special laws regulative of the methods by which the people of the counties themselves, as distinguished from the Legislature, may change their county seat. On the contrary, this amended section 1 of the act of the 11th of March, 1887, is simply an amendment of that part of the Political Code regulating the method by which the people of the counties could and do fix their county seats in all counties. Sections 4 and 6 of the Political Code, which have been above cited, belong to that class of legislation to which said amended section 1 belongs, and are not, even were they local laws, and made since the 30th of July, 1886, within the prohibition of this act of Congress. Said amended section 1 is simply the curing of what the Legislature deemed *cassus omissis* in the Political Code. This amended section 1 of the act of the 11th of March, 1887, provided for the case of large counties or county, as the case might be, where the temporary location made by the County Commissioners under section 4, quoted above, had failed to be changed by a majority vote under section 6 of the Political Code quoted above, and simply gave the people *another* opportunity themselves (and not the Legislature) to fix their county seat by their own vote, just as all county seats were fixed by the people under the general laws.

Not only is it expressly, literally, and unambiguously plain that this act of Congress is directed *only* against fixing and changing county seats by the special or local legislative choice and act, as distinguished from the people's fixing their county seats under regulations by the Legislature, but a consideration of the *mischiefs* which this act of Congress was obviously intended to remove, leads conclusively to the same result. It is a notorious fact, taught by the universal experience of the age, that there are no subjects upon which the pernicious influence of the lobby, and of money, and the like, upon Legislatures, are more frequent and more injurious than in regard to such questions as the locations of seats of government; and it was the removal of *this* mischief that this act of Congress, so far as it relates to county seats, was intended to meet and remove.

Besides this, the Legislature of large Territories are far less competent to determine a purely local question like the location of a county seat than are the body of the electors of the county directly affected.

This being manifestly the mischief meant to be overcome by this act of Congress, this consideration combines with the express and unambiguous language of the text to establish that the thing prohibited was a selection of the *locus* of county seats by the legislative mind or act.

Again, it cannot be fairly said in reply to this that, since this act of Congress prohibits the Legislature from locating a county seat by its *direct* act and law, it equally prohibits all laws which effect a change of the county seat by *indirection*, through local and special election for making such change. This is no good reply, for the obvious reason that the *only* thing which the act of Congress prohibits is, as already fully noticed, prohibiting the legislative mind from deciding upon the location of county seats directly.

Therefore a law in which the legislative mind or law does not pass upon, nor touch the question of location at all, but leaves that wholly to the people, is not one doing by *indirection* that one and only thing which said act of Congress prohibited from being done directly; but is one which does not come within the Congressional prohibition at all. The Congressional prohibition does not extend at all to the matter of making either general or local laws *regulative of the methods by which the people, as distinguished from the Legislature,* shall locate or change their county seats. Such location or change by act and choice of the people is wholly untouched by the act of Congress. That act of Congress touches nothing except a location or change of county seats by the direct act of the legislative mind or choice. That location by the direct choice made by the mind of the Legislature is prohibited, and not locations by choice and vote of the people, whether that choice or vote of the people is exercised under special or general territorial laws.

Of course it is true that this act of Congress of July 30th, 1886, prohibits local or special legislation on each one of the subjects enumerated in that act. If the section under which the county seat was moved to Aberdeen be indeed one whereby the legislative mind—the law—fixed Aberdeen as the county seat, and if that act is local or special, then that section one is made void by this act of Congress. But if said amended section one does not itself locate the county seat, then it is not within the Congressional prohibition, *although it may be local or special.* This act of Congress no more prohibits the Territorial Legislature from making a local or special law which does *not* locate or change a county seat, but prescribes a method by which the people may make the change, than does this act of Congress prohibit local legislation touching any other conceivable subject unnamed in this act of Congress.

The opposing brief, on page 1, also quotes the next paragraph in this act of Congress which follows the paragraph relating to county seats, to wit, the words, "*regulating county and township affairs,*" and puts these last-quoted words in italics. We suppose from this quotation (because the brief is otherwise silent regarding these particular words) that it may be claimed that said section one of the act of the 11th of March, 1887, is one "regulating county affairs." Plainly this is not so. The *only* thing done or which *could be* done, by the vote under this section one, is to change county seats. That change of county seat being *expressly mentioned* in the first paragraph, the succeeding paragraph, regarding regulating county affairs, cannot be construed to *mean and repeat the same thing* as the preceding one already mentioned, namely, locating county seats. "Regulating county and township affairs," of course means legislation permanently affecting the *administration* of county affairs, and has no reference to the special, isolated, and temporary act of fixing county seats.

What we have now gone over, it seems to us, makes it so plain that there was error in the court below in holding that the act of Congress nullified this amended section one of the act of the 11th of March, 1887, that we do not deem it necessary to enter upon the discussion of the question whether this section one is a "local or special law," as distinguished from a general law.

In the matter of Church, decided in 1883, (92 New York, 1,) will be found an elaborate discussion of this whole matter of what, in this class of cases, is a local or special, as distinguished from a public or general law. There, touching the difficulty of determining between these two classes of laws, the court remarks:

> "It is not easy to define with accuracy the difference between the two forms of legislation, and the difficulty is better solved by adding examples to definitions. Of the latter, the most useful and accurate is that given in the matter of the New York Elevated Railroad (70 N. Y., 328.) A law relating to particular persons or things, *as* a class, was said to be general; while one relating to particular persons or things *of* a class, was deemed local and private."

In this case it will be seen that the court, on an able review of the authorities, reaches the conclusion that a law, public and general in its nature, is not rendered a local or private one by the circumstance that, under the conditions of its enactment, it could apply to but one individual of the class which its general terms would embrace.

Should the court care to enter upon this branch of the case they will find amongst the latest cases on the subject that the cases of—

Ewing *v.* Hoblitzell, 85 Mo., 64,
Ex Parte Wells, 21 Fla., 280,
Reynolds *v.* Foster, 89 Ill., 257,

—are amongst the most instructive, and hold to the same law as is laid down in the case *Ex-parte* Church, (92 N. Y.) *supra.*

But we do not deem it proper to enter into any extended discussion of the question whether this is a local or special law or not, because the fact that it is not a law in which the Legislature, as distinguished from the people, undertakes to fix the county seat, takes it wholly outside of the prohibition contained in said act of Congress, and renders the decision of the court below, as we most respectfully submit, palpably erroneous.

S. SHELLABARGER,
J. M. WILSON,
For Appellant.

Office Supreme Court U.S.
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CLERK.

IN THE

Supreme Court,

OF THE

UNITED STATES.

WASHINGTON, D. C.

OCTOBER TERM, 1888.

JOHN E. ADAMS,
Respondent,
vs.
FRED B. SMITH,
E. J. MATHER,
W. I. STEERE,
HORACE BARNARD, AND
C. W. SWIFT,
as County Commissioners,
Appellants.

BRIEF OF RESPONDENT IN SUPPORT OF MOTION TO DISMISS AND AFFIRM.

C. S. PALMER, Attorney for Respondent.

DAKOTA BELL PUBLISHING COMPANY, SIOUX FALLS.

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Appellants.

STATEMENT OF FACTS.

On July 30th, 1886, was approved "An act of Con-"gress, entitled an act to prohibit the passage of local or "special laws in the Territories of the United States, to limit "territorial debt and for other purposes."

By Section 1 of said act the "legislatures of the territo-"tories of the United States now, or hereafter to be organized, "shall not pass local or special laws in any of the following "enumerated cases, that is to say—granting divorces; chang-"ing names of persons or places; laying out, opening, altering "and working roads for highways; vacating roads, town plats, "streets, alleys and public grounds; *locating or changing coun-"ty seats; regulating county and township affairs;* regulating "the practice in courts of justice; regulating the jurisdiction "and duties of justices of the peace, police, magistrates and "constables, etc." * * * * * * * *

Section nine (9) of said act was as follows: "That all "acts hereafter passed by any territorial legislature in conflict "with the provisions of this act shall be null and void."

At the time of the passage of the foregoing act of Congress, the general law of the Territory in force for the organization of counties and locating of county seats provided; that upon proper application by the residents of any unorganized county the Governor of the Territory was authorized to proceed in its organization and appoint, three or five county commissioners, whose duty it was, among other things, to locate the county seat for such county, temporarily. (Sec. 2, Chap. 21, Political Code.) After such organization and at the first general election thereafter the legal voters of such county were authorized to designate on their ballots the place of his choice for county seat, and the place so designated receiving a *majority of all the votes* polled was thereafter to be the county seat. But if no place voted for, received a *majority of all the votes cast*, the place temporarily located as the county seat was to remain the county seat until changed by the next, or Section 7 of Chapter 21 of the Political Code. (Sec. 6, Chap. 21, Political Code.) Section 7 provided in substance that upon petition being presented to the county commissioners, signed by two-thirds of the qualified voters of the county it was then their duty at the next succeeding General Election to notify the voters to again designate upon their ballots the place of their choice, and if, upon a canvass of such vote, any place so designated had received *two-thirds* of all the votes polled, such place was to be the location of the county seat. The above is the substance of all the material parts of Sections 4, 6 and 7 of Chapter 21, of Political Code, hereinafter referred to.

The controversy here relates to the question of the County Seat of Brown County, Dakota. By virtue of Section 4, above referred to, the city of Columbia, in said county, was made the county seat and remained so for many years under the provision of Section 6, of Chapter 21. After the passage by Congress of the act above referred to, and on the eleventh day of March, 1887, the territorial legislature passed an act entitled,

" An act to provide for the relocation of county seats in coun-
"ties where county seats have been located by a vote less than
" a majority of all the electors voting thereon."

This act, though somewhat general in its title and its terms, could in fact apply to only one county in the Territory of Dakota—that was the county of Brown. (See respondent's complaint or notice of contest and appellants' demurrer thereto in printed record.) By virtue of the legislative act of March 11th, 1887, *supra*, an election was held in Brown County, the votes canvassed, and the county seat of said Brown county declared to be changed from Columbia to Aberdeen, in said county. The respondent proceeded under the laws of Dakota to contest the validity of such election upon the sole ground that the act of the Territorial Legislature of March 11th, 1887, was unconstitutional, it being in conflict with the act of Congress of July 30th, 1886, *supra*; setting forth specifically that no other county in the Territory could then, or at any future time, come within the provisions of said act of March 11th, 1887. To this complaint or notice of contest the appellants' here entered a demurrer. In the District Court of the Territory the demurrer was sustained and by appeal the case passed for review to the Supreme Court of the Territory where it was argued and decided. The Supreme Court of Dakota holding, unanimously, that said act of March 11th, 1887, was in conflict with the act of Congress of July 30th, 1886, and therefore unconstitutional and void, and said court reversed the decision of the District Court, and rendered judgment absolute for appellant, this respondent, John E. Adams. (See printed record.) From that judgment the appellants' here asked and were allowed an appeal to the Supreme Court of the United States. Is the case thus presented subject to review by this Court? We think not for reasons stated in the above notice for dismissal and affirmance.

JOHN E. ADAMS,
By his Attorney, C. S. PALMER.

BRIEF OF RESPONDENT IN SUPPORT OF MOTION TO DISMISS AND AFFIRM.

The Legislative Assembly of Dakota, at its session of 1887, passed a Law providing for the relocation of county seats in certain cases. It was entitled "an act to provide for "the relocation of county seats in counties where county seats "have been located by a vote less than a majority of all the "electors voting thereon." It became a law March 11, 1887, without the approval of the Governor. (See Chapter 173, Laws of 1887.) On March 11th, 1887, another act amending Section one (1) of the above mentioned act was passed. (See Chapter 174, Laws of 1887.)

Section one (1) of the act as amended reads as follows: "That in all counties in this Territory having a population not "less than twelve thousand as shown by the census of 1885, "and having an area of not less than forty-eight Congres- "sional townships, and in which the present county seat "thereof has been heretofore temporarily located under the "provisions of Section four of Chapter 21 of the political "Code, and remained the county seat under the provisions of "Section six of Chapter 21 of the political Code, by reason "of the fact that no place received a majority of all the votes "cast at the election held under the provisions of said Section "six of Chapter 21 of the political Code, there shall be held "a special election of the duly qualified voters of such coun- "ties on the 12th day of July, A. D., 1887, at which election "the question of the relocation of the county seat of such "counties shall be voted upon. Provided that such election "shall not be held in any county unless there shall be present-"ed to the Judge of the District Court of the District in which "such county is situated, or in his absence from such District, "or in his inability to act, to the Chief Justice of said Terri-"tory, a petition signed by at least one-third in number of "the electors of said county as shown by the vote cast at the "last general election, praying said Judge to issue an order "directing the holding of said election as provided in this act. "If said Judge shall find that said petition is signed by one-"third of the electors of said county as above provided, he "shall issue an order directing said election to be held in ac-"cordance with the provisions of this act." Other sections of the act provide for giving notice of the election, form of ballots, canvass of the vote, removal of the records, etc., and need not be set out at length.

In pursuance of this act an election was held in Brown county on the question of relocating the county seat, on the 12th day of July, 1887, which resulted in a majority of the votes being cast for the relocation of the county seat at the city of Aberdeen. Afterwards, on the 26th day of July, 1887, the several county offices, with the Record Books and papers belonging thereto respectively, were removed from Columbia to the city of Aberdeen.

On the 28th day of July, 1887, an order was made by the Judge of the Fifth District granting leave to the plaintiff to contest said election. Summons and Notice of Contest were served on the County Commissioners in accordance with the provisions of Chapter 54, Laws of 1885. The defendants demurred. The District Court *pro forma* sustained the demurrer, dismissed the action, and rendered judgment against the plaintiff for costs. The plaintiff appealed to the Supreme Court of the Territory where the case was argued at the October, 1888, term and that Court reversed the judgment of the District Court and rendered judgment absolute for this respondent upon the ground that the act of March 11th, 1887, of the Territorial Legislature was unconstitutional and void, because it was in direct conflict with the act of Congress, approved July 30th, 1886, prohibiting special legislation in the territories.

The substance of the material allegations of the complaint to which the demurrer was directed were:

1. That the plaintiff was a qualified elector of Brown county, Dakota Territory.

2. That these appellants were the duly qualified and acting board of county commissioners of said county.

3. That said Brown county had been for many years duly organized—and that Columbia was and for many years had been the legally established county seat thereof—and had so remained under the provisions of section (6) chapter (21) of the political code of Dakota Territory, by reason of the fact that no place received a majority of all the votes cast at the election held under the provisions of said section (6) of chapter (21) of said political code.

4. That said Brown county had a population of more than twelve thousand people as shown by the census of 1885 and has an area of not less than forty-eight congressional townships.

5. That the counties of Brown and Cass in said territory of Dakota are the only counties in said territory that have respectively more than twelve thousand inhabitants according to the census of 1885 and not less than forty-eight congressional townships each.

6. That the county seat of said Cass county was located at Fargo in said county by a direct vote of the territorial legislature approved January 4, 1873, and was not, for that reason, affected by the provisions of the territorial act of March 11, 1887.

7. That on the 11th day of March, 1887, the legislature of said Territory passed "an act to provide for the relocation

"of county seats in counties where county seats have been located by a vote less than a majority of all the electors voting "thereon."

8. That by virtue of the provisions of said act a petition was signed by the requisite number of voters of said Brown county praying for a vote to relocate the county seat of said county—the necessary order of the Judge of the District Court ordering said election. The due publication of the notice, the election, the necessary vote to warrant the order for the change of location from Columbia to Aberdeen. The canvass of the vote, the proclamation by the county commissioners declaring the city of Aberdeen to be the county seat under and by virtue of said act of the Dakota Legislature of March 11, 1887.

9. The removal of the county offices from the city of Columbia to the city of Aberdeen.

10. That the said county of Brown was at the time of the passage of said act the only county in said Territory which had a population of twelve thousand people as shown by the census of 1885, and an area of at least forty-eight congressional townships, and in which the county seat had been temporarily located under the provisions of Sec. (4) of chapter (21) of the political code, and remained the county seat under the provisions of Sec. (6), chapter 21, of the political code, by reason of the fact that no place received a majority of all the votes cast at the election held under the provisions of said Sec. 6 of chapter 21 of the political code, and was and is the only county in said Territory to which said act was or is applicable, as the legislature well knew when it passed said act, and that the object and purpose of passing said act was to evade and nullify the act of Congress approved July 30, 1886, entitled "an act "to prohibit the passage of local or special laws in the Territories of the United States and to limit territorial indebted-"ness, and for other purposes."

11. Charging that for such reasons the said act of the territorial legislature and all the proceedings had in and about such election to be absolutely void, and praying that said act and election proceedings be declared unconstitutional and void and for a return of the county offices and books and records from the city of Aberdeen to the city of Columbia, etc. The cause came on regularly for hearing in the Supreme Court of the Territory of Dakota at its October, 1888, session at Deadwood in said Territory, at which time, after full arguments, the said Court were unanimously of the opinion that the District Court erred in its judgment sustaining the demurrer—reversed the judgment of the District Court and rendered judgment absolute for the respondent herein, as will appear from the printed record in the case which is on file in this Court. Whereupon the appellants here by their counsel in open court asked and were allowed this appeal. Has this court thereby acquired jurisdiction?

AUTHORITIES.

John E. Adams, this respondent, contested the election in the Territorial courts upon the sole ground that the act of March 11th, 1887, authorizing it was in conflict with the act of Congress approved July 30th, 1886, prohibiting special legislation in the territories, as will appear from the plaintiff's complaint or notice of contest—the defendant's demurrer thereto—the assignment of errors—and decision of the Supreme Court of Dakota—all of which appear in the printed record. The act of March 3d, 1885, (23 Stats., 443) provides—

" Section 1. That no appeal or writ of error shall hereafter be allowed from any judgment or decree in the Supreme " Court of any of the territories, unless the matter in dispute, " exclusive of costs, shall exceed the sum of five thousand " dollars.

" Sec. 2. The preceding section shall not apply to " any case wherein is involved the validity of any patent or "copyright, or in which is drawn in question the validity of "a treaty or a statute of, or an authority exercised under the "United States; but in all such cases an appeal or writ of error "may be brought without regard to the sum or value in "dispute."

By none of the provisions of the above act is this appeal authorized.

The contest is not for money or any right, the value of which "can be measured by money."

Potts, et al., vs. William Chumasero, et al., 92 U. S., 385.
Kurtz vs. Moffitt, 115 U. S., 487.

Clearly no question is presented involving "the validity "of a treaty or Statute of, or an authority exercised under the "United States."

By an act of Congress of July 30th, 1886, certain limitations were imposed upon the general powers conferred upon the law-makers of the several territories. In the light of that act a question is presented involving the validity of the act of the Territorial Legislature ot March 11th, 1887—nothing more. It is difficult to perceive how the validity of any other Statute is raised or how any authority exercised under the United States is "drawn in question."

Snow vs. United States, 118 U. S., 346.
Bethell vs. Demaret, 10 Wall., 537.
Brown vs. Colorado, 106 U. S., 95.

II.

The judgment in this case was against Fred B. Smith, W. I. Steere, E. J. Mather, Horace Barnard, and C. W. Swift, as a board of county commissioners of the county of Brown, Territory of Dakota. As appears from the record, before the appeal was perfected in this court, three of said board declined and refused to perfect said appeal, declined to enter into any undertaking, and directed their attorneys to abandon said appeal, etc. Two of said board only executed the undertaking and are prosecuting this appeal. This action of the majority of said board was before anything had been done toward perfecting said appeal in this court excepting the application and allowance of the same in open court at the time of the rendition of the judgment in the Supreme Court of Dakota Territory. No severence has been attempted, either in the judgment or by subsequent summons and severence, or any other proceeding. It is true the names of all the board of commissioners appear as joint appellants, but it appears from the record that this was without authority and that a majority of said board declined and refused to so join. For this irregularity this appeal must be dismissed.

Owings vs. Kincannon, 7 Pet., 402.

Simpson vs. Greeley et al., 20 Wall., 152.

Feibelman vs. Packard, 108 U. S., 14.

III.

That this appeal was taken for delay only must be apparent from the record, and under the authority of *Micas vs. Williams* we respectfully ask that the motion to affirm be granted, as provided by par. 5 of Sec. 6 of the rules of this court.

Micas vs. Williams, 104 U. S., 556.

Whitney vs. Cook, 99 U. S., 607

Zeckendorf vs. Johnson, 123 U. S., 617.

IV.

The record in this case having been printed by the respondent, it is respectfully asked that the motions be at this time considered.

Ex-parte Russell, 13 Wall., 664.

Thomas vs. Wooldridge, 23 Wall., 283.

Clark vs. Hancock, 94 U. S., 493.

Respectfully submitted,

C. S. PALMER,
Attorney for Respondent.

130-177
130-177

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 149.

ISAAC S. LYON, APPELLANT,

vs.

JOHN B. ALLEY.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED OCTOBER 17, 1885.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 149.

ISAAC S. LYON, APPELLANT,

vs.

JOHN B. ALLEY.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, AUGUST 3, 1888.

1 *Original Bill. Filed March* 17, 1883.

In the Supreme Court of the District of Columbia, the 17th Day of March, 1883. In Equity.

JOHN B. ALLEY, Complainant,
vs. } No. 8494.
ISAAC S. LYON, Defendant.

To the supreme court of the District of Columbia, holding an equity court for said District:

John B. Alley, complaining, says—

1. That he is a citizen of the State of Massachusetts, now temporarily residing in the District of Columbia, and brings this suit in his own right and for the benefit of persons claiming under him, as hereinafter stated.

2. That the defendant, Isaac S. Lyon, is a citizen of the District of Columbia and is now a resident thereof.

3. That the complainant was the owner in his own right of all the following-described premises, lots, and parcels of ground situate in the city of Washington and District of Columbia, to wit, lots from one (1) to twelve (12), both inclusive, in square one hundred and fifty-six (156), and was possessed of an estate in fee simple therein; which said premises were conveyed to him by Thomas Sunderland and wife by deed dated January 26, 1881, and duly recorded January 31, 1881, in Liber 957, page 275, of the Land Records of the District of Columbia; and the said Thomas Sunderland derived his title to the said premises by deed from James M. Latta, trustee, to said Sunderland, dated October 10, 1878, and duly recorded November 11, 1878, in Liber 900, page 263, of the Land
2 Records aforesaid; and the said Latta, trustee, derived his title
to said premises by two deeds in fee from Hallett Kilbourne, trustee, to said Latta, dated, respectively, May 5, 1872, and October 11, 1872, and recorded November 6, 1872, respectfully, in Liber —, page —, and Liber 700, page 129, of the Land Records aforesaid; and the said Hallett Kilbourne, trustee, acquired his title thereto by deed from Thomas Young and wife to said Kilbourne, trustee, dated October 2, 1871, and recorded October 5, 1871, in Liber 658, page 312, of the Lands Records aforesaid; to which said several records of the said five deeds the complainant refers and prays that the same may be taken as part of this his bill.

5. That said lots from one to twelve, inclusive, having been subsequently subdivided, the complainant conveyed parts of said lots as follows: By deed from John B. Alley and wife to Mary R. Bigelow, dated February 17, 1881, recorded March 22, 1881, Liber 964, page 349, one lot; by deed from John B. Alley and wife to Kate W. Armes, dated February 24, 1881, recorded April 19, 1881, Liber 966, page 177, one lot; by deed from John B. Alley and wife to Harvey L. Paige, dated February 23, 1881, recorded April, 8, 1881, Liber 962,

page 302, one lot; by deed from John B. Alley and wife to Robert McMeen, dated July 1, 1881, recorded July 28, 1881, Liber 978, page 334, two lots; by deed from John B. Alley and wife to George E. Emmons, dated July 1, 1881, recorded August 1, 1881, Liber 979,
page 118, four lots, each of said lots being twenty-five feet
3 front and ninety-five feet and six inches deep to an alley;
to the record of which said several deeds the complainant refers and prays that the same may be taken as part of this bill; and the complainant is informed and believes that the several parties to whom he conveyed the said lots have in turn sold and conveyed to other persons, but whose names are not known to this complainant, parts of the premises so conveyed by his said deeds above referred to, and that now there is a large number of persons owning and making claim of title to some part of the said original lots one to twelve, inclusive; that this complainant, his grantees named above, and the persons so claiming under them are now and have been continuously in actual possession of all the said original lots from one to twelve, inclusive, and that the deeds so made by himself and wife conveyed a title in fee simple with full covenants of warranty, under which he is bound to defend and make good the title as it existed in him and was derived from the said Hallett Kilbourn, trustee, dated October 2, 1871, and that therefore, while this his said bill is brought in his own right, it also is in the interest and to quiet the title of all the persons hereinbefore named and others claiming title under this complainant.

6. That the defendant herein, Isaac S. Lyon, claims that he has some title, lien, or claim upon the whole of the said original lots from one to twelve, inclusive, as well as upon the several sublots into which the same have been in whole or in part divided, which
claim and pretension he is asserting and wrongfully claims
4 that he has right and authority to defeat and divest the title
of the complainant and his grantees in fee simple to the whole of the said premises; that the nature of the said claim of the said defendant Lyon is, as the complainant is informed and believes, as follows:

That one Henry Birch entered into a contract about April 1, 1870, with the then existing corporation of the city of Washington by which he undertook, for a certain consideration therein named, to set curbstones, pave gutters and sidewalks on P street in front of the said lots one to twelve, inclusive, and that he executed said work, and, the same having been approved on or about November 17, 1870, that the proper officers some time thereafter made an assessment, but he does not state in his claim when the said assessment was in fact made, but that some time thereafter and on or about March 9, 1872, certificates were issued by the Board of Public Works of the District of Columbia for the tax and assessment aforesaid, amounting to the sum of $2,054.10, which bore interest at ten per cent., which Board of Public Works succeeded, on the 21 of February, 1871, to all the rights and privileges, duties and obligations, of the corporation of the city of Washington, which said certificates were afterwards, for a good and valuable consideration, assigned by the

said Birch to the said defendant Lyon, and that thereafter, the said Board of Public Works having been abolished and a Board of Commissioners being created, the defendant Lyon called upon the collector of taxes of the District of Columbia to enforce payment of said certificates by a sale of said lots, and that said sale was accord-
5 ingly made some time in 1881, at which the said Lyon alleges
he became the purchaser and bought all of the said original lots from one to twelve, inclusive, at said tax sale and paid for the same by surrendering the said certificates so originally issued to said Birch, and received thereon twelve certain certificates of sale and purchase, one for each of the said lots, under which the said defendant now, as your complainant is informed and believes, claims to be the owner of each and every of the lots one to twelve inclusive, in square one hundred and fifty-six.

The truth of all of which several and foregoing claims, assertions, and pretences the complainant denies, and states the facts to be as follows, on his information and belief:

7. That no lawful assessment for the said supposed tax or charge was ever in fact made, but that an improvement was commenced by the corporation of Washington some time prior to the 16 of November, 1870, in front of and along P street adjacent to said lots, and he is informed and believes that an assessment for grading, curbing, and paving was made for the same upon adjoining property on the line of said improvement, and that a record of said assessment was made, but that no assessment was made upon lots from one to twelve, inclusive, for grading, curbing, or paving, nor was any record then or until long thereafter ever made, kept, or found in the office or upon the books where the same was by law required to be kept in order to give notice of said assessment or to render the said property liable therefor; but that subsequently, on the — day of November, 1871, there was falsely and unlawfully entered on
6 the said assessment book the pretended assessment relied upon
by the defendant Lyon as the basis of the said certificates to said Birch, and a note was at the same time entered opposite said assessment as follows:

"NOVEMBER 11, 1870.

"This work was done at this date, but on request of the owner not entered until Nov., 1871.

"WILLIAM FORSYTHE,
"*Surveyor D. C.*"

The complainant does not know by whose direction or authority the said pretended assessment or the said entry quoted above was made, but he is informed and believes that Thomas A. Young was at the time the owner of the said lots, and that the said assessment against said lots, from one to twelve, inclusive, was collusively made and with the knowledge, consent, approval, and procurement of the said Henry Birch, but that the same was done without the knowledge or consent of himself or Hallett Kilbourn or any of the intermediate grantors from whom the complainant claims and after the conveyance of said property to said Kilbourn, but that the said

Kilbourn and his grantees down to the complainant by and through whom the complainant derives title were innocent purchasers without notice of any assessment for said property or the existence of the said pretended certificates so issued to said Birch or of any lien or charge upon said property on account of said alleged improvement, and that they bought the said property from Young in total ignorance thereof and without suspicion of anything having been done in that respect and after a search of the record of the
7 corporation of Washington where said assessment and lien, if any, existed was required to be kept, and where, on such search, they found no record or memorandum of any such lien or assessment, and they therefore and for that reason hold the said premises free and discharged thereof.

8. And the complainant further says that, as he is informed and believes, the page of the record upon which said pretended assessment was thus illegally entered was a completed record, and that after all the lawful entries that had been or could be entered thereon were in fact made the same was duly signed as required by law in certification and completion of said record by Matthew G. Emery, then mayor of Washington, as by a copy of said record filed herewith and to which the complainant refers will more fully and at large appear, and that the said entry of an assessment was inserted over the signature of the said Emery about nine months after said Emery had ceased to be mayor of Washington and after the corporation of Washington had itself been succeeded by the Board of Public Works, and the said assessment was therefore null and void, and of which the said defendant Lyon and his pretended assignor Birch had full notice and knowledge.

9. The complainant further says that by section 37 of an act of Congress of February 21, 1871, entitled An act to provide a government for the District of Columbia, a Board of Public Works was created, and there was given to that board the entire control of
8 street paving, grading, curbing, &c., in the city of Washington, and they were required thereby to assess a reasonable portion of the expense of paving, "not to exceed one-third, upon the adjoining property," and that the alleged assessment hereinbefore referred to, if made at all, was, in fact, made after the date of the said last-named act of Congress, to wit, in November, 1871, and was made for the full expense and cost of said improvement, in violation of the provisions of the section last referred to, and was therefore null and void.

10. That by the provisions of an act of Congress of June 20, 1874, the Board of Public Works was abolished, and the authority theretofore exercised by that board was vested in Commissioners, but that no assessment for said improvement, grading, paving, or curbing was made by said Board of Public Works before, up to, or at the time that the said organization passed out of existence, nor was any assessment made at any time thereafter by its successor, the said Commissioners, but the District of Columbia and John F. Cook, collector of taxes, having unlawfully and without such assessment proceeded to advertise said lots from one to twelve, inclusive, for sale as delin-

quent for non-payment of said alleged tax for the said special improvements, James M. Latta, trustee, filed his amended bill in this court on the 29 of June, 1875, in equity cause No. 4450, against the District of Columbia and John F. Cook, collector, and others, to which the complainant refers and prays that the same may be taken as part of this bill, alleging the illegality of the said proceeding and
the facts and circumstances as hereinbefore stated in this be-
9 half, and prayed, among other things, that the said District
of Columbia, John F. Cook, collector, and the other defendants be perpetually enjoined and restrained from selling or attempting to sell the said lots from one to twelve, inclusive, and from collecting or attempting to collect the said pretended tax thereon, and such proceedings were thereupon had that a temporary restraining order was by the decree of this honorable court duly issued enjoining and restraining, until the further order of this court, the sale of the said property on account of the said tax and any and all attempts to collect the same, of which the District of Columbia, John F. Cook, collector, and the said Isaac S. Lyon had notice, which said order is still in force and has never been set aside, annulled, reversed, appealed from, or in any manner whatsoever impaired.

11. That afterwards and on or about the — day of ——, 1881, the said defendant, Isaac S. Lyon, applied to the District of Columbia and to John F. Cook, the collector of taxes, for a sale of the said lots from one to twelve, inclusive, under the pretended power and authority of the said certificates so alleged to have been assigned to him by said Birch, and the said lots were, as the complainant is informed and believes, in fact sold at public auction for the said alleged delinquent tax, at which sale the said Lyon became the purchaser of all of said lots for the amount specified in the said several certificates, the District of Columbia, the said John F. Cook, collector, and the said Isaac S. Lyon well knowing that the said
sale was in violation of law and in contempt of the restrain-
10 ing order of this court hereinbefore mentioned, and that on
said sale there was, as the complainant is informed and believes, issued to said Lyon twelve certificates of purchase or title to the said twelve lots, and which said certificates are now, as the complainant believes, in the possession of the said defendant Lyon, and that upon the issuance thereof to him he surrendered for cancellation the said original certificates so issued to said Birch and by Birch assigned to said Lyon, and the same were in fact and law surrendered, discharged, and cancelled; but the complainant alleges that he had no knowledge or information of the said advertisement or sale of the said property until after the same was had and completed, as hereinbefore stated, and that he thereupon applied to the said defendant Lyon and requested that he would surrender said certificates for cancellation, and that he would by proper releases and acquittances to the complainant discharge the said lots from one to twelve, inclusive, from the cloud created and cast by the said certificates upon the title to the said lots, which the said Lyon refused to do and still doth refuse.

12. That the said pretended claim of the said defendant Lyon,

though illegal and void in law, does create a cloud and incumbrance upon the complainant's title which seriously impairs the value thereof and greatly interferes with his power to sell and dispose of the said property and has involved him in the necessity of giving to purchasers of the said property bonds of indemnity against the said pretended claim of the said defendant; that he and his 11 grantees are in the actual possession of all of the said property, and while the defendant has not instituted ejectment or other possessory actions to recover the whole or any part of the said lots he uses his said pretended claim as a menace and a cloud upon the complainant's title; that he has hitherto so used the same and still continues so to do.

The complainant thereupon prays—

First. That the said Isaac S. Lyon may be made a defendant hereto and that a subpœna may be issued to him out of and under the seal of this honorable court, directed to the said defendant, requiring him to appear in this honorable court, on a certain day therein written, to answer the premises and to abide such decree as the court may make therein.

Second. That this honorable court will decree that the said pretended assessment of November, 1871, if made, was without authority of law and did not constitute any lien upon the whole or any part of the said lots from one to twelve, inclusive.

Third. That the said pretended tax certificates bearing date March 9, 1872, so issued to the said Birch and by him assigned and transferred to the said Lyon were without authority in law and did not constitute any lien on the whole or any part of the said lots nor create any title, charge, or incumbrance on the same.

Fourth. That the said pretended sale alleged to have been made on the — day of ——, 1881, was illegal and contrary to law, and that the same was held and made in contempt of the authority of this court, and for that reason also was null and void, and 12 the said sale did not create or give any right, title, or claim, in law or in equity, upon the said lots, nor create a charge, lien, or incumbrance upon the same or any part thereof.

Fifth. That the said certificates of sale issued to the defendant and dated the — day of ——, 188–, were issued without authority and in violation of law, as well as in contempt of the order of this court, and are not evidence of any title to or lien upon said lots, and that the said defendant Lyon be required to either surrender the said certificates for cancellation or release and discharge all of the said lots from one to twelve, inclusive, therefrom.

Sixth. That an injunction issue out of and under the decree of this honorable court against the said Isaac S. Lyon, his agents, attorneys, and assigns, enjoining and restraining him and them from using, employing, or setting up in any way whatsoever any right, title, or claim to the said lots by virtue of the said pretended assessment or certificates or the purchase by him at the said tax sale, or of the said certificates of sale issued to him on his said pretended purchase.

And for such other and further relief as to the court may seem proper in the premises.

The complainant files herewith the following exhibits, which he prays may be taken as part of this his bill:

Exhibit No. 1, copy of the original page on which the alleged assessment was made.

No. 2, copy of one of the certificates alleged to have been issued to Birch.

No. 3, copy of one of the said certificates of sale.

JOHN B. ALLEY.

H. H. WELLS,
Sol'r and of Counsel.

13 DISTRICT OF COLUMBIA, *ss:*

John B. Alley, the above-named complainant, being duly sworn, says that he has read the foregoing bill of complaint signed by him and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be on information and belief, and as to these matters he believes it to be true.

[SEAL.] JOHN BEALL,
Notary Public.

(See table.)

15 EXHIBIT NO. 2 TO ORIGINAL BILL. Filed March 17, 1883.

$513.54. City of Washington Paving Stock. No. 819.

CITY OF WASHINGTON,
GOVERNOR'S OFFICE, *March* 9, 1872.

Be it known that there is due from the mayor, board of aldermen, and board of common council of the city of Washington to Henry Birch or his assigns the sum of five hundred and thirteen $\frac{54}{100}$ dollars, being the amount due on the first instalment, bearing interest from the 17th day of November, eighteen hundred and 71, at the rate of ten per centum per annum, being stock issued in pursuance of an act of the board of aldermen and board of common council of the said city, passed on the twenty-eighth day of October, 1867, entitled "An act concerning paved footways," for setting the curbstone and paving the footway in front of square 156, lot- 1 to 12, inclusive, assessed to Thomas Young—

The principal and interest of which is to be paid out of the special tax fund agreeably to the terms of the above-recited act.

H. D. COOKE, *Gov'r.*

JOHN F. COOK, *Register.*

[Written on margin:] City of Washington paving stock.

Endorsed.

For value received, I hereby assign all my right, title, and interest in the within to Isaac S. Lyon.

HENRY BIRCH.

Pay to the order of the collector of taxes D. C. the amount of the within certificate on account tax sale (purchase) certificate of the property herein described.

Oct. 10, 1881.

ISAAC S. LYON.

Witness:
ALLEN C. CLARK.

16 Exhibit No. 3 to Original Bill. Filed March 17, 1883.

Office of the collector of Taxes for the District of Columbia.

Washington City, *October* 5, 1881.

I, John F. Cook, do hereby certify that, by authority in me vested as collector of taxes for the District of Columbia, I have this fifth day of October, A. D. eighteen hundred and eighty-one, sold at public auction, in pursuance of a public notice or advertisement duly published and in accordance with the provisions of existing law, subject, however, to redemption within two years from said sale, lot one (1), in square numbered one hundred and fifty-six (156), assessed in the name of Thomas Young, for taxes due and remaining unpaid and unpaid penalties and costs as follows, to wit:

Taxes due District of Columbia for fiscal year ending June 30, 188–	$	
Penalties thereon		
Costs "		
Taxes due the corporation of Washington for all of tax for paving and curbing footway	260	00
Interest at 10% from November 17, 1871	256	35
Costs thereon		25
Total	516	60

Amounting to five hundred and sixteen dollars and sixty cents; and that Isaac S. Lyon, being the highest bidder, became the purchaser thereof at and for the sum of five hundred and sixteen dollars and sixty cents.

The receipt of the above taxes, penalties, and costs of the sale is hereby acknowledged.

Witness my hand and seal this fifteenth day of October, A. D. eighteen hundred and eighty-one.

[SEAL.] JOHN F. COOK,
Collector of Taxes.

17 The following is a description of the above-mentioned property:

Square No. 156, tol 1. All of tax for paving and curbing footway, on interest from November 17, 1871, $260.00.

Witness:
DAVID WARNER.

18 *Subpœna to Answer. Original Bill. Issued March* 17, 1883.

In the Supreme Court of the District of Columbia.

JOHN B. ALLEY, Complainant, *against* ISAAC S. LYON, Defendant.	No. 8494. Equity Docket 22.

MARCH 17, 1883.

The President of the United States to Isaac S. Lyon, defendant:

You are hereby commanded to appear in this court at its first special term occurring twenty days after service of this subpœna and answer the exigency of the original bill, under pain of attachment and such other process of contempt as the court shall award.

Witness D. K. Cartter, chief justice.

R. J. MEIGS,
Clerk, &c.,
By M. A. CLANCY,
Ass't Clerk.

Return on Subpœna.

APRIL 5, 1883.

Served on Isaac S. Lyon March 29, 1883.

CLAYTON McMICHAEL,
U. S. Marshal.

19 *Answer to Original Bill. Filed May* 29, 1883.

In the Supreme Court of the District of Columbia. In Equity.

JOHN B. ALLEY *vs.* ISAAC S. LYON.	No. 8494.

The answer of Isaac S. Lyon, defendant, to the bill of complaint of John B. Alley, plaintiff, against him in equity exhibited.

For answer to said bill, or so much thereof as I am advised it is material and proper for me to make answer unto, answering, I say as follows:

1 and 2. I admit the residence of the parties as alleged in these two paragraphs of said bill.

3. I admit that the plaintiff was the owner in fee simple of said lots from 1 to 12, both inclusive, in square 156, and that his said title was derived from said Thomas Young through the several mesne conveyances set forth in this paragraph in said bill.

5. I admit that said lots from 1 to 12, inclusive, having been subdivided, the plaintiff made the several conveyances of distinct parts thereof as stated in this paragraph of said bill, and that some of said grantees have in turn sold and conveyed certain parcels of said real estate to other persons.

I admit that the plaintiff, his said grantees, and the persons claiming under them have been and are in possession of said real estate; that the deeds from the plaintiff and wife purported to convey a title in fee simple, and contained full covenants of warranty on the part of the plaintiff, under which he is bound to defend the title so con-
veyed by said deeds to his grantees and their assigns; that
20 he has given bonds of indemnity to said purchasers from
him to indemnify them and their respective heirs and assigns against any claim hereinafter referred to against said real estate, and that this proceeding is in his own right and in the interest of his said grantees and of those claiming under them.

6. It is true that I claim that I have some title, lien, or claim upon the whole of said original lots from 1 to 12, inclusive, and, in consequence thereof, upon the several sublots into which the same have been divided.

The nature of said claim and the facts and circumstances connected therewith are as follows:

The late corporation of the city of Washington passed the following act, approved November 2, 1869:

> "Chapter 236.—An act to set the curbstones and pave the footways and gutters on the north side of P St. north, between Sixteenth street west and Rock creek.
>
> "Be it enacted by the board of aldermen and board of common council of the city of Washington, That the mayor be, and he is hereby, authorized and required to cause the curbstones to be set and the footways and gutters paved on the north side of P street north, between Sixteenth street west and Rock creek, the work to be contracted for and executed in the manner and under the superintendence provided by law, and to defray the expenses of said improvements a special tax equal to the cost thereof is hereby imposed and levied on all lots or parts of lots bordering on the line of the improvement; the said tax to be assessed and collected in conformity with the provisions of the act approved October 12, 1865."

The act of Congress approved February 23, 1865, conferred upon
said corporation full power and authority to lay taxes on par-
21 ticular wards, parts, or sections of the city for their particular
local improvements, and to cause the curbstones to be set, the foot and carriageways, or so much thereof as they may deem best, to be graded and paved, &c., and to lay and collect a tax upon all property bordering upon each street that may be paved by said corporation in accordance with the provisions of said act.

In pursuance of this act of Congress said corporation, in order to carry into effect the powers given to it by the act of October 12, 1865, extended and re-enacted a previous act passed by it May 23, 1853, entitled An act in relation to paved footways, and further enacted that the cost and expense of such local improvements, unless otherwise provided for in the act ordering the same, shall be levied, assessed, collected and paid, and the payment thereof enforced in the same manner as provided in said act of May 23, 1853. Webb's Digest, p. 361. Webb's Digest, p. 155.

By an act of said corporation passed June 10, 1867, it was made the duty of the mayor to appoint a superintendent and inspector of the paving of carriageways and footways, &c., and by said act said superintendent and inspector *was* charged with the duty of making all assessments on lots or parts of lots bordering on any street, &c., which shall have been paved, &c. Webb's Digest, p. 467.

By an act approved October 28, 1867, said corporation enacted that thereafter all taxes assessed on private property for the paving of carriageways and laying of foot pavements and gutters, &c., should be collected as follows:

One-fourth of such assessment within 30 days after the service of the notice by the collector of taxes, and the remaining 22 three-fourths in three equal annual payments, for which deferred payments it was made the duty of the mayor to issue certificates of indebtedness bearing interest at the rate of 10 per centum per annum, and repealed all acts or parts of acts inconsistent with the provisions of said act.

That said lots from 1 to 12, inclusive, were in what was known and designated as the First ward of said city of Washington, and bordered on the north side of P street north, between 16th street west and Rock creek, to wit, on the north side of said P street, between 17th and 18th streets west.

That on or about April 1, 1870, one Henry Birch, a practical paver, entered into a certain contract in writing, made in pursuance of law, with said corporation of the said city of Washington (the original of which is now or should be in the possession of the District of Columbia, the successor of said corporation), under which he undertook, for the consideration therein mentioned, to set the curbstone, lay the gutter, and pave the sidewalk in front of said lots from 1 to 12, both inclusive.

That said Birch fully executed and completed the work to be done under said contract in the manner provided therein and under the direction and control of the officers duly appointed for that purpose by said corporation, and the same was duly accepted by said corporation on or before November 17, 1870.

That the cost of said work to be paid to said Birch, as duly ascertained, was $2,054.10.

That the assessment for the payment of the special tax imposed and levied upon said lots therefor by said act of November 2, 1869, was duly made by the proper officer, but was not entered on the assessment sheet until November, 1871, at which date the 23 same was duly entered and notice thereof duly sent to the office of the collector of taxes for the District of Columbia, which had in the meantime, by force of an act of Congress approved February 21, 1871, became the successor of said corporation of Washington.

That on November 17, 1871, said collector of taxes entered said assessment for said cost of said work against said lots from 1 to 12, inclusive, in a special tax ledger in his office (a book provided for such purposes and containing all unpaid assessments of special taxes against real estate in said city of Washington), and issued due notice thereof to the owner of said lots.

That afterwards, to wit, on March 9, 1872, four certain certificates of indebtedness for the payment of said work authorized by law were issued by the proper officers of the District of Columbia, made payable to the said Henry Birch or his assigns and delivered to him, and meant and intended to be a lien upon said property issued pursuant to law in payment for said work and accepted by him in good faith as such, true copies of which said certificates are filed herewith as part of this answer, marked, respectively, Exhibits I. S. L., No. 1, 2, 3, 4.

That afterwards I purchased said certificates in good faith from said Henry Birch for their full market value, without knowledge or notice of any fact or circumstance affecting or in any way impeaching their validity.

No part of the principal or interest of said certificates have ever been paid either to said Birch or me, unless the facts hereinafter stated shall be construed to amount to such payment.

That after the purchase as aforesaid of said certificates and after they or some of them had become due, I called on the 24 collector of taxes of the said District of Columbia to enforce the payment thereof by a sale for the taxes so as aforesaid assessed upon said lots; that said sale was long delayed, and on applying to the officers of the District to learn the cause of the delay I was put off by various excuses, and as said certificates bore interest at the rate of ten per centum I did not urgently press the matter until the year 1881, and then succeeded in getting a sale made.

That at said sale I became the purchaser of each of said lots and paid for them with said certificates so issued as aforesaid to said Henry Birch and a small sum in cash, and received from the District of Columbia other certificates of tax sale, true copies of which are herewith filed as part of this answer, marked, respectively, Exhibits I. S. L., No. 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, & 16, inclusive.

That said bill in equity cause No. 4450 was filed by said James M. Latta seeking to restrain a sale for unpaid taxes assessed on certain other real estate in which I had no interest, charging, in substance, that it was for taxes assessed for grading, guttering, and setting the curbstones under a contract made between one George Neitzey and the corporation of Washington and executed after said corporation had ceased to exist; and afterwards said Latta filed an amended bill in said cause so as to embrace said work done in front of said lots from 1 to 12, in square 156, averring that work also to have been done by said George Neitzey after said corporation had ceased to exist. A preliminary restraining order against the sale of said property for the tax assessed for said improvement was issued by the court in said cause, and no hearing has ever 25 been had thereon. I pray leave to refer to the proceedings in said cause and make the same part of this answer.

Neither said Henry Birch nor myself were parties to said cause, and I deny that I had any knowledge whatever or notice thereof until after I had purchased said lots at tax sale as aforesaid, nor was there any note or memorandum in the office of the collector of taxes against said property of said proceedings or of said restraining order.

Any averments in said bill inconsistent with the foregoing statement I deny to be true.

7. I deny that the assessment referred to in this paragraph of said bill as made against said lots in November, 1871, was collusively made and with the knowledge, consent, approval, and procurement of said Henry Birch.

I deny that said Kilbourn and his grantees down to the complainant were innocent purchasers without notice of any assessment or of the existence of said certificates issued to said Birch or of any lien or charge upon said property for said improvement.

I aver that said Kilbourn well knew that said work had been done by said Birch at the time he took said conveyance from said Young and the cost thereof, and each of said purchasers, including the plaintiff, who purchased subsequent to November 17, 1871, if they had examined the records in the office of the collector of taxes, where by law the same is required to be kept and where alone the law required them to look, would have found the record of said assessment against said lots, and they took the same with constructive notice thereof if not actual notice.
26

8. I deny that the fact of the entry of said assessment against said lots on said assessment sheet by said Forsyth after the same had been signed by the mayor invalidated said assessment, and am advised and so aver that the law did not require the signature of the mayor or his approval of the assessment, but that the same was required by law to be made by said William Forsyth, who was surveyor as well as superintendent and inspector; that the same was made by him and duly certified by him, as required by law, to the collector of taxes, who then entered the same of record against said property; that the lien for the same upon said lots was created by the levy imposed by said act of the corporation of Washington of November 2, 1869, of which all persons were bound to take notice, and that said lien has in no way since been removed or discharged.

9. I deny the conclusion of law stated in this paragraph of the bill, and aver that said work was completed on or before November, 1870, and did not come within the law relative to assessments for work done by said Board of Public Works.

10. Denying other conclusions of law stated in said bill, for further answer thereto, I aver that said plaintiff at the time of his purchase of said lots well knew of said assessment for said work and of the issuance of said certificates for the amount thereof, and that the same were wholly unpaid, and afterwards, with full knowledge thereof, when an alteration had been made by the District of Columbia in the grading and paving of P street in front of
27 said lots, received from the District of Columbia $772.32 for
the materials put there by said Birch under his said contract,

constituting the tax against the said property the payment of which he is now seeking to avoid.

On advice I aver that said plaintiff is estopped thereby to deny the validity of the lien for said work of which he has thus availed himself of the benefit.

Having answered fully, I pray to have the benefit of the cross-bill I have filed herewith in order to obtain the relief to which I am entitled by reason of the premises.

ISAAC S. LYON.

I, Isaac S. Lyon, being duly sworn, depose and say that I have read the foregoing answer by me subscribed and know the contents thereof, and the matters and things therein set forth of my own knowledge are true, and those set forth upon information and belief I believe to be true.

ISAAC S. LYON.

Subscribed and sworn to before me May 4, 1883.

R. J. MEIGS, *Clerk*,
By M. A. CLANCEY, *Ass't Clerk*.

28 *Cross-Bill. Filed May* 29, 1883.

In the Supreme Court of the District of Columbia.

John B. Alley
vs.
Isaac S. Lyon.
} Equity No. 8494.

Isaac S. Lyon, defendant in the original bill filed herein, brings this his cross-bill against John B. Alley, plaintiff in said original bill, and respectfully shows unto the court and avers as follows:

1. That said original bill was filed herein March 17, A. D. 1883, and the defendant's answer thereto is filed at the same time with this his cross-bill.

2. That the late corporation of the city of Washington passed an act, approved November 2, 1869, to set the curbstones and pave the footways and gutters on the north side of P street north between 16th street west and Rock creek.

Other acts of said corporation provided for the mode of assessment of the cost of said work against the real estate abutting the same, the issuing of certificates of indebtedness to the contractor for the payment of the work, and the collection of the same from such property as stated in the 6th paragraph of said answer; that said lots from 1 to 12, inclusive, in square 156, were situated in what was known and designated as the First ward of said city and bordered on the north of said P street between 16th street west and Rock creek, to wit, between 17th and 18th streets west.

3. That one Henry Birch, a practical paver, on or about April 1, 1870, entered into a contract with said corporation of the city 29 of Washington to set the curbstones, lay the gutter, and pave the sidewalk in front of said lots from 1 to 12, inclusive, fully

performed and executed the same, and the same was duly accepted by said corporation on or before November 17, 1870, as stated in said answer. The cost of said work to be paid to said Birch, as duly ascertained, was $2,054.10.

That the assessment for the payment of the special tax imposed and levied upon said lots by said act of November 2, 1869, was duly made by the proper officer, but was not entered upon the assessment sheet until November, 1871, when notice thereof was duly sent to the collector of taxes of the District of Columbia, the successor of said corporation, and on November 17, 1871, said collector of taxes entered said assessment for said cost of said work against said lots in the special tax ledger in his office, a book provided for such purposes, and issued due notice thereof to the owner of said lots.

4. That the four certificates of indebtedness (Exhibits I. S. L., Nos. 1, 2, 3, 4, filed with said answer) were duly issued to said Henry Birch in payment for said work, which were subsequently purchased by me from said Birch in good faith for their full market value without knowledge or notice of any fact or circumstance affecting or in any way impeaching their validity. No part of the principal or interest thereof has ever been paid otherwise than is stated in said answer.

5. Afterwards said lots were sold for the payment of said
30 taxes; were purchased by me; paid for by said certificates of
indebtedness, and certificates of tax sale were issued to me, as
detailed in said answer.

6. That one Thomas Young was seized in fee simple of said lots at the time of the imposition and levy of said special tax thereon, and that said John B. Alley derived title in fee simple thereto from said Young through the several mesne conveyances set forth by him in his said original bill; that said Alley subdivided said lots, made the several conveyances of distinct parcels thereof, as stated in said bill, and that some of said grantees have in turn sold and conveyed certain parcels thereof to other persons; that said Alley in his said conveyances warranted said titles in fee simple to his grantees and their assigns and has given bonds of indemnity to said purchasers to indemnify them, their heirs and assigns, against this plaintiff's claim by reason of the matters set forth in the bill and answer in this cause.

7. That under said bill in equity cause No. 4450 a restraining order against the sale of said property for said tax had been passed by the court, and all the statements relative thereto in said answer are hereby made averments herein as though fully incorporated in this cross-bill.

8. That said Hallet Kilbourn at the time he took said conveyance of said lots from said Thomas Young well knew that said work had been done by said Birch and the cost thereof, and each of said purchasers, including the plaintiff, who purchased subsequent to No-
vember 17, 1871, if they had examined the records in the
31 office of the collector of taxes, where by law the same is re-
quired to be kept and where alone the law required them to
look, would have found the record of said assessment against said

lots, and they took the same with constructive, if not actual, notice thereof.

9. That said act of November 2, 1869, imposing and levying said tax created a lien on said lots, of which all persons were bound to take notice, and that said lien has not been satisfied or discharged.

10. That said John B. Alley at the time of his purchase of said lots had notice of said assessment for said work, of the issuance of said certificates for the amount thereof, and that the same were wholly unpaid, and afterwards, with full knowledge thereof, when an alteration had been made by the District of Columbia in the grading and paving of P street in front of said lots, received from said District $772.32 for the materials put there by said Birch under his said contract.

Whereupon the plaintiff herein prays as follows:

1st. That the amount of said certificates, the cost of said work, with interest thereon at the rate of ten per centum per annum as called for thereby, may be decreed to be a lien on said lots from 1 to 12, inclusive.

2d. That said John B. Alley may be decreed to pay said lien, with interest as aforesaid.

3d. That the plaintiff herein may have such other and further relief as to your honors may seem meet and the nature of the case may require.

32 4th. That the defendant be required to answer this cross-bill under oath.

5. That the writ of subpœna may issue, directed to said defendant, John B. Alley, commanding him, &c., &c.

ISAAC S. LYON.

Isaac S. Lyon, being duly sworn, says that he has read over the above cross-bill by him subscribed and knows the contents thereof, and that the facts therein stated of his own knowledge are true, and those stated on information and belief he believes to be true.

ISAAC S. LYON.

Sworn to before me May 26, 1883.

R. J. MEIGS, *Clerk*,
By J. R. YOUNG, *Ass't Clerk*.

33 *Subpœna to Answer Cross-Bill. Filed May* 31, 1883.

In the Supreme Court of the District of Columbia.

JOHN B. ALLEY, Complainant,
against
ISAAC S. LYON, Defendant.
No. 8494.
Equity Docket 22.

MAY 29, 1883.

The President of the United States to John B. Alley, defendant:

You are hereby commanded to appear in this court at its first special term occurring twenty days after service of this subpœna and answer the exigency of the cross-bill, under pain of attachment and such other process of contempt as the court shall award.

Witness D. K. Cartter, chief justice.

R. J. MEIGS, *Clerk, &c.*,
By R. J. MEIGS, Jr., *Ass't Clerk.*

Return on Subpœna to Cross-Bill.

Returned May 31, 1883. Served on John B. Alley.

H. H. WELLS.

34 *Replication. Filed October* 3, 1883.

In the Supreme Court of the District of Columbia, the 3d day of October, 1883. In Equity.

JOHN B. ALLEY
vs. No. 8494.
ISAAC S. LYON.

The complainant hereby joins issue with the defendant and will hear the cause on bill, answer, and proofs.

H. H. WELLS,
Sol'r for Compl't.

35 *Answer of John B. Alley to Cross-Bill. Filed October* 11, 1883.

In the Supreme Court of the District of Columbia, the 3d Day of October, 1883. In Equity.

JOHN B. ALLEY
vs. No. 8494.
ISAAC S. LYON.

The answer of John B. Alley, complainant in the equity cause No. 8494, John B. Alley *vs.* Isaac S. Lyon, to the cross-bill filed by said defendant Lyon in said cause.

For answer to the said cross-bill, or so much thereof as he is advised it is material and proper for him to make answer unto, he, answering, says as follows:

1. That his original bill was filed on the 17th day of March, 1883, in the form and for the purposes stated therein.

2. That he does not know in detail the truth of the averments in the 2d paragraph of the said cross-bill contained, except that he is informed and believes that the late corporation of the city of Washington did attempt to set the curbstones and pave footways and gutters on the north side of P street between Sixteenth and Eighteenth streets northwest, in the city of Washington, and to make a contract with one Birch for said work, and that the lots from one to twelve, inclusive, in square one hundred and fifty-six, were on the north side of P street and between Seventeenth and Eighteenth streets

west, but he denies that there was in fact any assessment ever made
for said work or any part thereof against the said lots from one to
twelve, inclusive, except as is stated in the sixth paragraph of this
respondent's original bill, which he here refers to and adopts
36 the statements thereof as a part of his answer to said cross-
bill.

3d. That he does not know whether the said Henry Birch made the contract or performed the work or whether the same was duly accepted by the corporation of Washington or its successors, as stated in the third paragraph of said cross-bill, or whether the cost of the said work was the sum of two thousand and fifty-four dollars and ten cents; but he denies that any assessment was lawfully made upon said lots from one to twelve, inclusive, by the proper officer of the said corporation or its successor, or that due notice thereof was duly sent to the collector of taxes of the District of Columbia, or that the said collector, on November 17, 1871, or at any other time, duly entered said assessment for the cost of said work against said lots, or that the said lots or any of them were lawfully assessed; and he charges the fact to be that no lawful assessment was made thereon for said improvements, and that none of the said lots from one to twelve, inclusive, were, in law or in equity, chargeable for said pretended assessment; and he alleges that the facts and circumstances in relation thereto are true as stated in the seventh, eighth, ninth, and tenth paragraphs of his original bill, which he here refers to and prays that the same may be taken as part of this his answer to said cross-bill; and he alleges that the said pretended assessment was null and void, and that the said Birch and Lyon knew and were chargeable with notice thereof.

4. That he does not know of his own knowledge the facts and
circumstances attending the issuing of the said certificates
37 numbers 1, 2, 3, 4, or whether the said Lyon purchased the
same in good faith or what price he paid for the same; but
he charges the fact to be that the said certificates were unlawfully issued; that the same were null and void; and he is informed that the said Lyon purchased them with knowledge of their invalidity, and that he is not an innocent purchaser or holder; and he again reiterates and adopts as a part of his answer to this paragraph the said seventh, eighth, ninth, and tenth paragraphs of his original bill, and which he prays may be taken as a part hereof.

5. That he is informed and believes that the said lots were attempted to be sold for said pretended delinquent tax or assessment, and that said lots were at said sale attempted to be bid in by the said Lyon; but this respondent denies that there was any lawful sale of said lots or that they were delinquent, or that the said Lyon became the lawful purchaser thereof; and he alleges that the facts and circumstances as to the said pretended sale and purchase and the delivery of said twelve certificates of purchase and the rights, titles, and interests acquired by said Lyon thereunder are true, as the same are stated and set forth in the eleventh paragraph of the complainant's original bill, and not otherwise; which eleventh paragraph he now adopts and makes the same part of his answer to the said cross-bill.

6. In answer to the sixth, seventh, and eighth paragraphs
38 of the cross-bill he says that it is true, as he is informed and
believes, that Thomas Young was seized of the said lots from one to twelve, and that this respondent derived his title from Hallett Kilbourn, who was Young's grantee; but he denies that said Hallett Kilbourn or himself had notice or knowledge of any fact or circumstance that amounted to knowledge in fact or that put them upon his or their inquiry or gave them notice, in law or equity, of the existence of any such lien, title, or claim for said pretended work on said lots from one to twelve, inclusive, and he alleges that the facts and circumstances in relation thereto and the matters set forth in said sixth, seventh, and eighth paragraphs of the said cross-bill are truly and correctly set forth in his original bill, and especially in the third and seventh paragraphs; to which original bill and paragraphs he here again refers and makes them a part of this his answer.

7. In answer to the ninth and tenth paragraphs of the cross-bill he again denies that the said lots were subject to the said pretended assessment, or that the said tax certificates were a lien thereon, or that the said public sale of them as delinquent and the purchase thereat by said Lyon created in him any lien or right whatever to the same; that there was then an existing restraining order, duly made by this court, of which the said Lyon had actual and constructive notice, as this affiant believes, and that the said sale was made at his request, and that he has not now any right, claim, or title to the said lots or any part thereof, as he is advised by
39 his counsel and verily believes.

And this complainant, having fully answered the said cross-bill and such parts thereof as it was his duty to answer, prays that the cross-bill may be dismissed, and that he may have the relief herein by him prayed in his original bill.

JOHN B. ALLEY.

H. H. WELLS,
Sol'r and of Counsel.

COMMONWEALTH OF MASSACHUSETTS, } *ss:*
Suffolk,

BOSTON, *October 9th,* 1883.

John B. Alley, being duly sworn, says that he has read the foregoing answer subscribed by him and knows the contents thereof, and that the matters and things therein set forth on his own knowledge are true, and those set forth on information and belief he believes to be true.

Before me—
[SEAL.]

FRANK N. MUDGE,
Notary Public.

40 *Stipulation as to Agreed Facts. Filed September* 22, 1884.

In the Supreme Court of the District of Columbia.

John B. Alley
v.
Isaac S. Lyon.
Equity No. 8494.

For the hearing on the original and cross-bills herein it is hereby stipulated and agreed as follows, viz:

1. That complainant has given bonds of indemnity to said purchasers of portions of said real estate from him to indemnify them and their respective heirs and assigns from any loss by reason of the matter involved in this suit.

2. That said lots from 1 to 12, inclusive, front on the north side of P street north between 17th and 18th streets west, being on the north side of P street north between 16th street west and Rock creek, and located in what was formerly designated as the first ward of the city of Washington, District of Columbia.

3. On April 1, 1870, the corporation of Washington duly contracted with Henry Birch to set the curbstones and pave the footways and gutters in the first ward of the city of Washington for the year beginning April 1, 1870, and between that date and November 16, 1870, said Birch executed said contract and performed said work on said north P street bordering upon said lots 1 to 12, and the same was duly accepted by said corporation. The cost of said work bordering upon said lots to be paid said Birch was $2,054.10.

4. William Forsyth at the time said work was done by said 41 Birch was the superintendent and inspector of the paving of carriageways and footways under the corporation of Washington, under the act of June 10, 1867, and it was the duty of said Forsyth to enter upon a sheet or page of the ward book of said city the measurement of said work and the cost thereof apportioned against the several lots, from which the collector of taxes entered in the special tax ledger in his office the amount as assessed against each lot.

That Complainant's Exhibit No. 1, filed with the original bill, is a true copy of the entries in the ward book relative to the work done by said Birch under said contract; that at the time when the same was signed by the mayor, the superintendent of streets, and the commissioner and assistant commissioners of the ward, the entries therein in red ink were not on the same, but that said entries had been withheld therefrom and were not placed thereon until November, 1871, as appears therefrom, at which time said Forsyth was the surveyor of the District of Columbia; that upon the making of said entries relative to said lots from 1 to 12, in November, 1871, the collector of taxes of the District of Columbia entered the amounts in said special tax ledger in his office as assessed against said lots from 1 to 12 and served the notice thereof.

5. That, to wit, on March 9, 1872, the four certificates of indebt-

edness signed by the Governor and register of the District of 42 Columbia against said lots from 1 to 12, of which Exhibits I. S. L., Nos. 1, 2, 3, 4 are true copies, were issued and delivered to said Henry Birch, who sold and transferred the same to the defendant Lyon, for value, before maturity.

6. That said Lyon, after said certificates had become due, sought to have said lots sold by the collector of taxes for the payment thereof, and finally said collector of taxes for the District of Columbia did advertise and, on or about October 5, 1881, did sell said lots from 1 to 12 at public auction for the non-payment of said certificates, at which said sale said defendant Lyon became the purchaser of each of said lots, and there was then issued to him, upon the surrender by him of said certificates of indebtedness (which have been canceled) and the payment of a small sum in cash, the twelve certificates of tax sale, true copies of which are filed with his answer herein, marked Exhibits I. S. L., Nos. 5 to 16, inclusive.

7. That no part of said sum of $2,054.10 has ever been paid.

8. That the record and proceedings in said equity cause No. 4450 be considered as in evidence herein; that the collector of taxes, upon the service of the restraining order issued in said cause, made no entry or memorandum of the same against said lots 1 to 12, in square 156, but by mistake entered the same in his office as applying to lots in square 256.

9. The District of Columbia having made some alteration in the grading and paving of P street in front of said lots, the complainant in 1882 applied for and received from the District the sum 43 of $772.32 for the appropriation by it of the material put there by said Birch under his said contract.

10. That there was issued to Henry Birch, on January 13, 1871, fifty-two certificates of paving stock, being for four installments of taxes for cost of improvement, and which bore interest from November 16, 1870, at ten per cent., and which were signed by the mayor of the city of Washington, and which covered the entire amount of taxes for this improvement appearing at that time on the assessment roll.

11. That all acts of Congress and acts or ordinances of the late corporation of Washington having, in the opinion of counsel, any bearing hereon are to be considered as in evidence and may be read at the hearing.

June 7, 1884.

H. H. WELLS,
Sol'r for Alley.
WM. F. MATTINGLY,
Sol. for D'f't.

44 *Stipulation as to Evidence. Filed October* 14, 1884.

In the Supreme Court of the District of Columbia. In Equity.

JOHN B. ALLEY
vs. No. 8494.
ISAAC S. LYON.

Original and cross-bill.

It is hereby agreed that Henry Birch, if called as a witness, would testify the same as stated in the affidavit hereto annexed, and that the same may be read at the hearing as far as competent and relevant.

It is agreed, however, that no part of the statements and conversations alleged to have been made and to have taken place between said Birch and Hallett Kilbourn and Birch and Kilbourn and Latta be read in evidence, being the same that are enclosed in brackets on pages 2 and 3 of Birch's affidavit.

Oct. 11, 1884.

H. H. WELLS, *For Alley.*
W. F. MATTINGLY, *For Lyon.*

Henry Birch, being duly sworn, deposes and says that, under and by virtue of public invitation on the part of the mayor of the city of Washington, D. C., for proposals for setting the curbstones, paving the footways, gutters, and alleys in the First ward of said city during the year 1870, affiant submitted proposals for doing such work for and within said First ward, and was duly awarded the contract therefor; that, in accordance with act of the corporation of said city (67 council, chap. 236), approved November 2,
45 1869, affiant was directed to set the curbstones and pave the footway and gutters on the north side of P street north, between 16th street west and Rock creek.

Lots 1 to 12, inclusive, square 156, then owned by Thomas Young, were within said first ward, and bordered on the line of this improvement.

That affiant, as contracted, set the curbstones and paved the footway and gutters in front of and abutting said lots 1 to 12, inclusive, square 156, and that this work was done by him and finished in a good and workmanlike manner during November, 1870, under the supervision of the commissioners and two assistant commissioners of improvements of said First ward, and the same was accepted by them and duly measured by William Forsyth.

That during the progress of this work Thomas Young, the then owner of said lots (1 to 12, square 156), promised in person to pay affiant in full for the improvement of said lots when the work should be finished and measured, provided affiant would deduct ten per centum from the contract price thereof. Affiant agreed to this arrangement, as this requested reduction was less than the usual discount then made by him and other contractors when disposing of the assessment certificates or scrip issued to them in payment for such work. Moreover, affiant believed such promise would be carried out in good faith, as he had before this time improved lots belonging to said Thomas Young and had been by him paid cash therefor, after such 10 per cent. discount, at the completion and measurement of the work.

46 That soon after completing this improvement in front of said lots Thomas Young sent for affiant to come to his house, but affiant did not go at the time, but went a few days afterwards, when he found Thomas Young had left the city on account of ill health. He, Young, remained absent a considerable time, and upon his return called upon affiant, this being the first time affiant had met him since finishing said work, when affiant was informed by said Thomas Young that the Board of Public Works were running wild in their improvements in that section of the city, and through fear of these lots becoming further involved in heavy taxes he had sold them to Hallett Kilbourn, and I must look to him for the tax.

[That affiant thereupon visited the office of Hallett Kilbourn and talked over with him the matter of affiant's improvement of said lots (1 to 12, in square 156), and asked him to pay for the same. He remarked that they were going to dispose of the lots soon and declined to pay for said improvement, and said, Let the scrip thereon issue.]

That affiant afterwards applied to the city authorities to have said lots advertised by the collector of the D. C. in list of special taxes in default at next annual tax sale, and after this made application for the assessment certificates or scrip against these said lots, and received them on or about March 9, 1872. Said certificates bore date March 9, 1872, with interest on all at the rate of ten per centum from November 17, 1871, the date of the entry of said assessment on the special tax books of said city, and were signed by H. D. Cooke, Governor, and John F. Cook, register. They were four
47 in number, aggregating 2,054.10, and each represented an instalment of $\frac{1}{4}$ of the whole tax. (Act corporation of Washington, approved Oct. 28, 1867.)

That affiant retained possession and ownership of said certificates until about October, 1873, when he sold them for value to Isaac S. Lyon, of Washington, D. C.

[That just previous to such sale to said Lyon affiant called at the office of Kilbourn and Latta and offered said assessment certificates for sale to them with a view of securing therefor, if possible, more than said Lyon had offered, and affiant was then and there made an offer for said certificates, but it was less than said Lyon had offered, and there was no sale, although the subject of the tax was discussed and the prediction expressed that the matter would be revised and the property would not finally be subject to the whole tax.]

That recently and since December 1, 1881, the attention of affiant has been called to the entry of this said improvement (of lots 1 to 12, square 156) and the measurement thereof, upon the book of improvements for said 1st ward, by William Forsyth, surveyor, D. C., said entry appearing to have been made in November, 1871, and affiant says in reference thereto that he has no knowledge when said entry was made; that he made no promise to Thomas Young, or any one for him, nor was there any understanding between affiant and said Thomas Young, directly or indirectly, that the entry of said work (when finished) on the records or special tax books of said city should be suspended for any length of time by reason of said promise to pay or for any other reason; nor did he ever procure or advise such suspension, if any there was, or receive 48 any consideration therefor.

That affiant told Thomas Young that he would take immediate steps to have ten per cent. bearing scrip issued against said lots unless he paid as promised; that said Thomas Young was a friend of affiant, and, expecting to receive from him cash in hand for said work at more than market value of the scrip issued therefor, affiant trusted him for payment during his (Young's) absence and until notified by him that he had sold said lots, and in the meantime made no inquiry or gave any attention to what the D. C. officials charged with duties connected with such work had done or had not done.

HENRY BIRCH.

Sworn to and subscribed before me this 2d day of February, A. D. 1882.

[SEAL.] APPLETON P. CLARK,
Notary Public.

49 *Decree at Special Term. Filed October* 27, 1884.

In the Supreme Court of the District of Columbia. In Equity.

JOHN B. ALLEY
vs. } No. 8494.
ISAAC S. LYON.

This cause came on to be heard at the present term; was argued by the counsel for the respective parties, and upon due consideration thereof, it appearing to the court that the complainant is not entitled to any relief upon his original bill, and that the defendant is entitled to relief under his cross-bill herein, it is by the court ordered, adjudged, and decreed as follows, this 27 day of October, A. D. 1884:

That the amount of said assessment against said real estate, to wit, lots one, two, three, four, five, six, seven, eight, nine, ten, eleven, and twelve, in square numbered one hundred and fifty-six (156), in the city of Washington, District of Columbia, for which said four certificates were issued to said Henry Birch, viz., two thousand and fifty-four dollars and ten cents ($2,054.10), with interest thereon from November 17, 1871, at the rate of ten per centum per annum until October 5, 1881, and thereafter at six per cent. until paid, be, and the same hereby is, adjudged and decreed to be a lien upon said real estate in favor of said Isaac S. Lyon; that said John B. Alley

be, and he hereby is, allowed two months from this date within which to redeem said parcels of land by paying unto said Lyon or his solicitor of record said sum of two thousand and fifty-four dollars and ten cents ($2,054.10), with interest as aforesaid, upon
50 which being done, said Lyon shall convey to said Alley or
his assigns all his right, title, interest, and estate in and to said parcels of land in fee simple, and that said John B. Alley shall pay the costs of this cause, to be taxed by the clerk. Should said John B. Alley fail to redeem said real estate as hereinbefore provided, then the same, or so much thereof as may be necessary, shall be sold for the payment of the amount of said lien, and William F. Mattingly is hereby appointed trustee to make said sale.

The course of his proceeding shall be as follows: He shall first file in this cause his bond in the usual form in the penal sum of ten thousand dollars, with one or more sureties, to be approved by the court or one of the justices thereof, conditioned for the faithful performance of his duties as such trustee under this and under any further order or decree that may be passed by the court in this cause. He shall sell said property at public auction in front of the premises after at least ten days' notice of the time, place, and terms of sale by advertisement in one or more newspapers printed and published in the city of Washington, D. C., which said terms of sale shall be one-third cash and the balance at six and twelve months, with interest from the day of sale. Upon final ratification of any sale hereunder and full payment of the purchase-money he shall convey the property sold unto the purchaser thereof in fee simple, free from any interest therein of the parties to this cause, and shall bring the proceeds of sale into court, with a report of his
51 proceedings hereunder under oath, to abide its further order
or decree in the premises.

W. S. COX, *J.*

52 *Appeal to General Term.*

ALLEY
vs. } 8494.
LYON.

Enter appeal on behalf of complainant to general term.

H. H. WELLS, *For Pl't'ff.*

Appeal as ordered entered by the clerk.
November 5, 1884.

53 *Order Fixing Appeal Bond. Filed November* 5, 1884.

In the Supreme Court of the District of Columbia, this 5th Day of November, 1884. In Equity.

JOHN B. ALLEY
vs. } No. 8494.
ISAAC S. LYON.

It is ordered by the court that the supersedeas bond in the above-entitled cause on appeal from the special to the general term be, and the same is hereby, fixed at the sum of one thousand dollars, with one surety, to be approved by the court.

W. S. COX, *J.*

54 *Bond on Appeal to General Term.*

In the Supreme Court of the District of Columbia, the 15 Day of November, 1884.

John B. Alley, Plaintiff, } No. 8494.
—
Isaac S. Lyon, Defendant. }

The plaintiff having appealed to the general term from the decree pronounced herein on the 27th of October, 1884, in the equity court, and Thos. J. Fisher, surety for said appeal, for themselves and each of them, their and each of their heirs and personal representatives, appearing and submitting to the jurisdiction of the said general term, hereby undertake to abide by, perform, and pay its judgment which they agree may be pronounced against all of them in the penalty of one thousand dollars.

JOHN B. ALLEY, *Appellant.*
THOS. J. FISHER, *Surety.*

Approved:
W. S. COX, *J.*

[Endorsed:] No. —. —— —— *vs.* —— ——. Undertaking for appeal by —— —— to gen'l term.

55 *Decree in General Term and Allowance of Appeal to S. C. Filed February* 18, 1885.

In the Supreme Court of the District of Columbia, in General Term. In Equity.

John B. Alley } No. 8494.
vs.
Isaac S. Lyon. }

This cause having come on to be heard and having been argued and submitted and been duly considered by the court, it is ordered, adjudged, and decreed—

First. That the decree entered by the special term in this cause on the 27th day of October, 1884, be, and the same is hereby, reversed.

Second. That the alleged special assessment mentioned and set forth in the bill of complaint of November, 1871, upon lots one (1) to twelve (12), inclusive, in square number one hundred and fifty-six (156), in the city of Washington, District of Columbia, does not create or constitute any lien upon the said premises, so far as the complainant is concerned.

Third. That the sale made by the collector of taxes on the 5th day of October, 1881, of said lots from one (1) to twelve (12), inclusive, in square one hundred and fifty-six (156), to enforce said lien certificates and the twelve certificates of sale issued to the defendant Lyon as the purchaser at such sale, and dated October 15, 1881, were illegal and made contrary to law, and did not give to the defendant Lyon, the purchaser of said premises at said sale, any right, title, estate, or interest, in law or in equity, to the said premises or any part thereof.

56 Fourth. That the defendant, the said Isaac S. Lyon, his agents, attorneys, and assigns, and each of them, be, and they are hereby, perpetually restrained and enjoined from using, employing, or setting up in any way whatsoever the said assessment, lien certificates, or certificates of sale as legal and valid, and from claiming any right, title, or interest thereunder or by virtue thereof to the whole or any part of said lots, from one (1) to twelve (12), inclusive, in square one hundred and fifty-six (156).

Fifth. That the title of the complainant and his grantees and those claiming under him or them is free and released from any and all cloud, incumbrance, lien, claim, or demand, either in law or in equity, on account of the said alleged assessment, lien certificates, tax sale, and certificates of sale in the bill of complaint mentioned.

Sixth. That the cross-bill filed by the defendant in this case be, and the same is hereby, dismissed, and that the complainant do recover his costs, to be taxed against the defendant.

From this decree the defendant, Isaac S. Lyon, prays an appeal to the Supreme Court of the United States, which is allowed.

By the court:

D. K. CARTTER,
Chief Justice.

57 *Appeal Bond to Supreme Court U. S. Filed March* 21, 1885.

In the Supreme Court of the District of Columbia, the 21 day of March, 1885.

JOHN B. ALLEY
vs. } Equity No. 8494.
ISAAC S. LYON.

In error.

Know all men by these presents that we, Isaac S. Lyon, as principal, and William H. Slater, as surety, are bound unto the above-named John B. Alley in the sum of two hundred and fifty dollars, to be paid to the said John B. Alley, his executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 21 day of March, 1885.

Whereas the above-named Isaac S. Lyon has prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is that if the above-named Isaac S. Lyon shall prosecute his said appeal to effect and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

ISAAC S. LYON. [SEAL.]
WILLIAM H. SLATER. [SEAL.]

Sealed and delivered in presence of—
E. W. WHITTAKER.
M. G. LEE.

Approved March 21, 1885.
D. K. CARTTER,
Chief Justice.

58 AUTHENTICATION OF RECORD.

Clerk's Certificate.

CLERK'S OFFICE,
SUPREME COURT OF THE DISTRICT OF COLUMBIA.

I, R. J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals together constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court this 12 day of Oct., 1885.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk,*
By R. J. MEIGS, JR.,
Assistant Clerk.

Justice's Certificate.

I, David K. Cartter, chief justice of said court, do certify the foregoing attestation by R. J. Meigs, clerk of the said court, to be in due form.

Witness my hand and seal this 12 day of Oct., 1885.

[SEAL.] D. K. CARTTER,
Chief Justice.

Clerk's Certificate to Justice's Official Character.

I, R. J. Meigs, clerk of said court, hereby certify that David K. Cartter, whose genuine signature is subscribed to the foregoing certificate, was at the time of signing and attesting the same chief justice of said court, duly commissioned and qualified.

Witness my hand and the seal of said court this 12 day of Oct., 1885.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk*,
By R. J. MEIGS, Jr.,
Assistant Clerk.

Endorsed on cover: District of Columbia supreme court. No. 149. Isaac S. Lyon, appellant, *vs*. John B. Alley. Filed October 17, 1885.

In the Supreme Court of the United States. Oct. Term, 1888.

Isaac S. Lyon, Appellant,
vs. } No. 149.
John B. Alley.

In the above-entitled cause it is stipulated and agreed that the papers hereto annexed are true copies of the amended bill of complaint and the restraining order made thereon in the cause of James M. Latta, trustee, complainant, *against* the District of Columbia, John F. Cook, collector, and Theodore Sheckels, defendants, being cause No. 4450, in equity in the supreme court of the District of Columbia, and that the same may be read and considered at the hearing as part of the record of said above-entitled cause No. 149.

HENRY E. DAVIS,
For the Appellant.
H. H. WELLS,
For the Appellee.

In the Supreme Court of the District of Columbia.

James M. Latta, Trustee, Plaintiff,
vs. } Equity No.
The District of Columbia, *et al.*

To the honorable the justices of the supreme court of the District of Columbia, sitting in equity.

The plaintiff brings this his amended bill and avers and complains as follows:

1st. That he exhibited his original bill of complaint in this cause on the —— day of June, A. D. 1875.

2d. He amends the 2d paragraph of said original bill by adding thereto "and also lots numbered from one to twelve (1 to 12), both inclusive, in square No. one hundred and fifty-six (156) in said city."

3d. That the late corporation of Washington set the curb and paved the footway in front of said lots in the summer of 1870.

4th. That the plaintiff's grantor purchased said property in the month of October, 1871, at which time no assessment appeared on the books of said corporation against said property as there ought to have been, if claim was intended to be made by the said corporation for the same.

5th. That the pretended cost of said work, $2,054.10, was pretended to be assessed against said property in November, 1871, but how or by whom this plaintiff has been unable to learn; and he avers that the same was not done by any body authorized by law to assess the same, and that said assessment is illegal and void.

That the making of said pretended assessment at the time when it was made, so long after the purchase of said property by the plaintiff, if permitted to stand would operate as a fraud on the plaintiff.

6th. That the said John F. Cook, collector, has advertised said property for sale for said assessment on the 29th instant as alleged in said original bill.

That the advertisement of said lots in square one hundred and fifty-six (156) has not been advertised even twice a week for two successive weeks, but that the first insertion thereof in said paper was after the 17th instant, and that said advertisement is illegal and void.

7th. He adopts all the other averments in said original bill so far as applicable to said lots in square 156 and prays for the several and special relief, as therein prayed.

May it please your honor to grant unto the plaintiff the writ of subpœna directed to the said defendants; and that the defendants, the District of Columbia, and John F. Cook, the collector of taxes for said District, be enjoined from selling said property under the said advertisement.

WM. F. MATTINGLY,
Plaintiff's Solicitor.

I, John F. Olmstead, do swear that James M. Latta, the plaintiff in this cause is beyond the jurisdiction of the court; that I am his agent and have charge of all matters relating to said real estate; that I have read the foregoing amended bill and know the contents thereof; that the several matters therein stated as of personal knowledge are true, and those stated on information and belief I believe to be true.

JOHN F. OLMSTEAD.

Subscribed and sworn to before me this 28th day of June, A. D. 1875.

[SEAL.]

JOHN BULL,
Notary Public.

(Endorsement:) No. 4450. Eq. Doc. 15. James M. Latta, trustee, *vs.* The District of Col. John F. Cook, coll. Theodore Sheckels. File this amended bill & issue as prayed. Wm. F. Mattingly, pl'f. sol. Filed June 29, 1875. R. J. Meigs.

In the Supreme Court of the District of Columbia. June 29, 1875.

JAMES M. LATTA, Trustee, Complainant,
against
DIST. OF COL'A *et al.*, Defendants.
} Equity Docket.
No. 4450.

The President of the United States to the District of Col., John F. Cook, collector — Taxes, Theodore Sheckels, defendants:

You are hereby commanded to appear in this court, at the first special term occurring twenty days after service of this subpœna, and answer the exigency of the amended bill, under pain of attachment, and such other process of contempt as the court shall award.

Witness:

D. K. CARTTER,
Chief Justice.

[SEAL.]

R. J. MEIGS,
Clerk, &c.

R. J. MEIGS, JR.,
Asst. Clerk.

(Endorsement:) No. 4450. Equity docket. Spa. to ans. Amended bill. J. M. Latta, trustee, *vs.* Dist. of Col. *et al.* Issued June 29, 1875. Returned ——, 187–. Summoned and served notice for injunction on the Com-is. D. C., by their att'y, Wm. Birney, accepting service for J. F. Cook, col., and summoned Theo. Sheckels, June 29, '75. Alex. Sharp, marshal. Mattingly, sol. June 29, 1875. Edwards. Service accepted June 29, 1875, for the Dist. of Columbia. W. Birney, solicitor for Dist. of Col. Restraining order. Theodore Sheckels. An amended bill praying an injunction to restrain sale for taxes of lots Nos. 1 to 12 inclusive, sq. 156, is this day filed. Hearing is fixed for the 8th July, 1875, at 10 o'clock a. m. Until further order you are hereby restrained as prayed. By order of the court. Me. 9, p. 258. A. Wylie, justice, &c. Attest: R. J. Meigs, clerk, &c. By L. P. Williams, asst. clerk, &c. John F. Cook, coll. D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1888.

No. 149.

ISAAC S. LYON, APPELLANT,

vs.

JOHN B. ALLEY.

BRIEF FOR THE APPELLANT.

HENRY E. DAVIS,
For the Appellant.

JUDD & DETWEILER, PRINTERS.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1888.

No. 149.

ISAAC S. LYON, APPELLANT,

vs.

JOHN B. ALLEY.

BRIEF FOR THE APPELLANT.

I.

STATEMENT OF THE CASE.

This is an appeal from a decree of the supreme court of the District of Columbia, in favor of the appellee on a bill filed by him and dismissing a cross-bill filed by the appellant. The facts, which are principally set forth in an agreed statement at pages 20, 21 of the Record, are as follows:

By act of November 2, 1869, the late corporation of Washington enacted as follows:

"That the mayor be, and he is hereby, authorized and required to cause the curbstones to be set and the footways and gutters paved on the north side of P street north, between Sixteenth street west and Rock creek, the work to be contracted for and executed in the manner and under the superintendence provided by law, and to defray the expenses of said improvements a special tax equal to the cost thereof *is hereby imposed and levied* on all lots or parts of lots bordering on the line of the improvement; the said tax to be assessed and collected in conformity with the provisions of the act approved October 12, 1865." (Acts 67th Council, ch. 236, p. 116; Rec. 10.)

The act of October 12, 1865, thus referred to, extended prior acts of May 23 and 24, 1853, and provided that the cost and expense of every local improvement thereafter made, "unless otherwise provided for in the act or acts ordering the same, shall be levied, assessed, collected, and paid and the payment thereof enforced" as provided in said last-mentioned acts. (Webb's Digest, 360–'2.)

The act of May 24, 1853, does not bear upon the questions herein involved; and it will be noted that the act of November 2, 1869, above set out itself levies the tax thereby provided for and refers only the assessment and collection to the provisions of prior legislation.

The material provisions of the act of May 23, 1853 (Webb's Digest, 155 *et seq.*), to which resort must thus be had to ascertain the requirements as to assessment and collection of the tax in question, are as follows:

(1.) "That whenever a tax shall be laid for [paving, &c.,] it shall be the duty of the commissioner of improvements in whose district the property *taxed* may be" to procure from the surveyor "a certified plan of the property *so taxed*," to be deposited in the office of the register "subject to the inspection of all interested therein." (Sec. 3.)

(2.) That "forty days from the passage of any act *levying a tax*" for paving, &c., the proper commissioner of improvements shall proceed to execute the work "according to the proper graduation in front of the lot or lots *thereby taxed*," which lots shall alone be answerable for the tax unless the owner himself shall do the work to the satisfaction of the commissioner, "in which case the tax laid for the purpose shall become *released.*" (Sec. 5.)

(3.) That when the work is done the commissioner "shall deposit with the register a statement exhibiting the cost of [the work] in front of each *lot or part of lot* separately, and the amount of tax to be paid by each proprietor, and the register shall then, without delay, place in the hands of the collector of taxes a list of the *persons* chargeable with such tax, together with the amount due by each person, and the collector shall, within ten days after receiving such list, give notice in writing to each *proprietor*" to pay within thirty days, in default of which the tax, with ten per centum interest, shall be collected as other taxes on real property are by law collected, that is, by sale. (Sec. 6.)

(4.) That such work shall be paid for by certificates of stock, commonly known as "paving stock," issued by the mayor and given the contractor, and redeemable from time to time as the taxes may be collected. (Sec. 8.)

A later act (of June 10, 1867, Webb's Digest, 467–'8) created an officer, known as superintendent and inspector, and provided that he, with two assistant commissioners appointed from among those affected by any proposed improvement, should have exclusive control of such improvement; that the mayor should pay no bills for work under contract until the same should have been approved and the bills therefor signed by the superintendent and inspector, commissioner of the ward, and at least one of the assistant commissioners; and that the superintendent and inspector should "be charged with the duty of making all assessments on lots or parts of lots bordering on any street, alley, or avenue which shall have been paved," &c. And a still later act (of October 28, 1867, 65th Council, chap. 6) provided that all taxes for paving, &c., should be payable in four instalments, one-fourth "within thirty days *after the service of the notice by the collector of taxes* and the remaining three-fourths in three annual payments," for which certificates of indebtedness against the property involved should be issued by the mayor to the contractor.

Along the line of street provided to be paved, &c., by the act of November 2, 1869, were original lots numbered 1 to 12, inclusive, in square 156, then the property of one Young. The work of paving, &c., was duly contracted for and executed, and the amount properly chargeable therefor against said lots 1 to 12 was $2,054.10. The work was completed in November, 1870.

At that time one Forsyth was the superintendent and inspector charged, by the act of June 10, 1867, with the duty of making assessments on property for adjacent improvements; and it appears to have been the custom (though it was not required by law), for that officer to enter upon a sheet or page of what was called the "ward book" of the city the measurement of the work done and the cost thereof apportioned against the several lots concerned, from which the collector of taxes would enter in a book (also not required by law), called a "special tax ledger," the amount as assessed against each lot.

When the work under consideration was completed Forsyth entered all of it in the "ward book," with the proper proportionate charge against each lot, with the exception of Young's lots, 1 to 12 of square 156; as to which no entry was made *in the* "*ward book*" until November, 1871, when this entry was made: "Entered November 17, 1870. This work was done at this date, but, by request of the owner, not entered until Nov. —, 1871. Wm. Forsyth, S'v'yor D. C." (See Exhibit 1 to the bill of complaint. Rec. opposite p. 6.) In the interim, that is, between November, 1870, and November, 1871, the government of the city of Washington had been succeeded by that of the District of Columbia; the office of superintendent and inspector had been abolished; and Forsyth had become the surveyor of the District.

The omission of the lots in question was, as stated by Forsyth, "by request of the *owner;*" the contractor had nothing whatever to do with it. He says that Young had promised to pay him directly for the work in front of the lots, at a discount, but that he made no promise and had no understanding, directly or indirectly, with Young that the entry should be suspended; that he did not procure or advise the suspension or receive any consideration therefor; and that he made no inquiry and gave no attention to what the officials charged with duties connected with the work had or had not done in the premises. (Rec. 22–'4.)

When the entries relative to the lots were made, in November, 1871, the collector entered the amounts in the "special tax ledger" in his office as assessed against the lots, and gave the notice thereof prescribed by law. Therefore certificates of indebtedness against the lots, in conformity to the act of October 28, 1867, were issued to the contractor, who sold and transferred the same to the appellant, Lyon, for value, before maturity. A specimen of these certificates is Exhibit 2 to the bill of complaint. (Rec. 7.) After their maturity, and for default in their payment, Lyon procured the collector of taxes of the District of Columbia in 1881 to sell the lots in question and bought them in, paying the purchase price by surrendering the certificates of indebtedness aforesaid and paying the difference in cash. In return, he obtained twelve several certificates of tax sale, one as to each lot, bearing date October 15, 1881; a specimen being Exhibit 3 to the bill of complaint. (Rec. 8.) By the law under which these tax-sale certificates were issued the owner of property sold for default in payment of taxes is allowed to redeem the same within two years; and the certificates (see Exhibit 3), so recite .

By deed of October 2, 1871, shortly before the entry above mentioned was made against the lots in question, Young sold them to one Kilbourn, who in turn, in 1872, sold them to one Latta; and subsequently, by deed of January 26, 1881, they were conveyed to the appellee, Alley (Bill and Answer, par. 2, pp. 1, 9). While the title was in Latta, in 1875, a sale of the lots was attempted by the collector of taxes under a wholly different advertisement than that under which Lyon bought; which sale Latta filed a bill to enjoin, averring it to be attempted for the purpose of paying for work alleged to have been done in front of the lots by one Neitzey, a different person from the contractor who did the work for which the certificates of indebtedness were issued. Neither Lyon nor the contractor who did the work was made party to this bill. A temporary restraining order was issued on the bill, but no further proceedings were ever had thereon; no entry was made by the collector on his books of this restraining order; and Lyon knew nothing of it at the time of the sale at which he bought (Bill, par. 10; Rec. 4–5; Answer, par. 6, Rec. 12, 13; Agreed Statement, par. 8, Rec. 21). It is alleged by the bill (par. 7, Rec. 3, 4), and denied by the answer (par. 7, Rec. 13), that Kilbourn had no knowledge of the charge against the lots at the time of his purchase; *and there is no evidence on the point.* All subsequent purchasers, down to and including Alley, became such after the charge was entered against the lots on the "special tax ledger." Between February 17 and August 1, 1881, Alley, having subdivided the lots, sold and conveyed nine lots of the subdivision to sundry persons (Bill and Answer, par. 5, Rec. 1, 2, 9, 10), giving to such persons bonds of indemnity against any loss by reason of the charge claimed by Lyon in the premises (Rec. 20).

The District of Columbia afterwards made some alteration in the grading and paving of the street in front of the lots. Whereupon, although no part of the $2,054.10 has ever been paid, Alley applied for and received from the District, in 1882, the sum of $772.32 in payment for the appropriation by it of the material put there by the contractor who did the work in 1870, and the cost of which forms part of the charge for which the sale to Lyon was made.

Then, on March 17, 1883, Alley, purporting to sue as well for his grantees as for himself (Bill, par. 1, 5, Rec. 1, 2), filed his bill against Lyon, praying that the assessment in 1871, the sale to Lyon in 1881 and the certificates of sale issued to him might be declared null and void, &c. Lyon, having answered the bill, filed a cross-bill, setting out the facts and praying that his certificates might be decreed to be a lien against the lots, &c. The court in special term dismissed Alley's bill and granted the relief prayed by the cross-bill (Rec. 24–'5); which action was reversed, by a divided court, in general term. (Rec. 26–'7.) The opinions are printed in an appendix hereto.

II.

Assignment of Errors.

The court below erred:

1. In reversing the decree of the court in special term.
2. In decreeing that the assessment against the lots in question does not create or constitute a lien upon them, so far as the appellee is concerned.
3. In decreeing the sale by the collector of taxes of the District of Columbia of the lots in question illegal, and that it gave the appellee no right as to said lots.
4. In decreeing that the title of the complainant and his grantees to the lots in question is free from any lien or demand on account of the said assessment, certificates of indebtedness, tax-sale and certificates of sale in the bill of complaint mentioned.
5. In granting the relief prayed by the appellee.
6. In denying the relief prayed by the appellant.

III.

ARGUMENT.

It is to be noted that no tax-deed for the lots in question has ever been given, the original bill having been filed within the two years allowed for redemption from the sale.

A.

An examination of the original bill shows that its claims for relief are in effect three, viz:

1. That the whole cost of the work was charged against the lots, whereas after February 21, 1871, the rule of assessment, prescribed by law, was to charge only one-third of the cost.
2. That there was no lawful assessment of any kind against the lots; because what is claimed as an assessment was not made until November, 1871, one year after the work on which it was made had been completed and after the lots had changed ownership.
3. That the tax-sale complained of was void because in violation of the injunction of the supreme court of the District of Columbia.

1. The first contention is readily seen to be wholly without foundation.

The law upon which it is supposed to rest is a provision of the original section 37 of the act of Congress of February 21, 1871, known as the "organic act;" which provision is now section 151 of the Revised Statutes of the United States relating to the District of Columbia, as follows:

> "The Board of Public Works shall assess, in such manner as shall be prescribed by law, upon the property adjoining and to be specially benefited by the improvements authorized by law *and made by them*, a reasonable proportion of the costs of the improvement, not exceeding one-third of

such cost, which sum shall be collected as all other taxes are collected."

A subsequent act of the Legislative Assembly of the District, of December 19, 1871 (Acts 1st Assy. Spec. Sess. II, pp. 11–12), provided that "all improvements *made* subsequent to February 21, 1871," should be assessed in accordance with the requirements of the organic act aforesaid.

One of the agreed facts is that the work in question was done by the corporation of Washington between April 1 and November 16, 1870. (Par. 3, Rec. 20.) As, therefore, the work was done neither by the Board of Public Works nor subsequent to February 21, 1871, the contention under consideration must disappear from the case.

2. The second contention, viz: that there was no lawful assessment of any kind against the lots, is the one on which the appellee mainly relies.

This contention involves several propositions, viz:

a. The requirements that the commissioner of improvements should deposit with the register the statement prescribed and that the register should in turn place in the hands of the collector the list prescribed were mandatory and to be observed immediately; and that the non-observance immediately of those requirements made invalid and of none effect all subsequent proceedings.

b. The approval of the superintendent and inspector commissioner of the ward and at least one of the assistant commissioners was necessary to a valid assessment, and as the assessment in question was not on the sheet when those officers approved it their approval cannot be said to have attached to such assessment.

c. The government under which and the officer by whom a valid assessment could have been made were defunct when the assessment claimed was made, and the act of the person formerly such officer in making an assessment was a nullity.

In view of the considerations suggested below (*post*, "C"), in behalf of the appellant, passing notice of these several propositions will suffice at this point.

a. The requirements relied on by the first proposition were mandatory only so far that it was necessary that they should be substantially observed before *collection* of the tax was possible. They in nowise affected the tax itself. The law, as already seen, imposed no liability to interest even until after notice from the collector; and any delay in this notice in reality benefited the tax-payer. And unless some injustice has been done or some inequality occasioned equity will disregard a mere failure to follow the law. Delay in returning the tax-list will not invalidate a tax otherwise duly imposed.

Mills *vs.* Gleason, 11 Wis., 470, 497–'8.

b. The officers mentioned in the second proposition were required only to approve the contractor's *work*, not the assessments on account thereof, which were mere arithmetical calculations following the approval; and with these calculations the superintendent and inspector was alone concerned. The approval required by the law is sufficiently manifest from the consideration that without it no assessments at all would appear upon the sheet; and, besides, among the agreed facts are that the contractor performed his work, "the same was *duly accepted*" by the corporation, and its cost as to the lots in question was $2,054.10. (Par. 3, Rec. 20.)

Moreover, a requirement of such approval is directory only and its non-observance cannot affect the tax.

Brady *vs.* Bartlett, 56 Cal., 350.

c. The alleged invalid entry, asserted by the third proposition, is found in the "special tax ledger" already mentioned, from which Exhibit 1 to the bill (Rec., opp. p. 6) appears, from its certification, to be an extract. It will be noticed that the statement is, "*Entered* Nov. 17, 1870," followed by the further statement that the work, though done at that date, was not entered until a year later. These apparently inconsistent statements may be reconciled by supposing, (what was undoubtedly the fact), that while the superintendent and inspector himself actually made the assessment when the work was done, he kept it, at the owner's request, from such books as would cause it to reach the collector until the year after. Actual assessment thus appearing to have been made when the work was done, this third proposition in reality resolves itself into the first, viz: that due record of the assessment was not made.

3. The third contention for the appellee disappears in view of the record of the cause in which the injunction relied on was made. The amended bill was filed to prevent sale of the lots in question under a certain advertisement then running; the sale was restrained "as prayed;" and there the cause stopped. When the advertisement was made under which Lyon purchased no injunction was obtained or asked for.

B.

The appellee does not make by his bill a case remediable in equity.

1. The bill shows no such cloud on his title as calls for the interference of equity.

"If the alleged tax has no semblance of legality; if upon the face of the proceedings it is wholly unwarranted by law, or for any reason totally void, so that any person inspecting the record and comparing it with the law is at once apprised of the illegality, the tax, it would seem, could neither constitute an incumbrance nor an apparent defect of title; and therefore, in law, could constitute no cloud. If this be so, the jurisdiction which is exercised by courts of equity to relieve parties by removing clouds upon their titles could not attach in such a case . . . It has been held in some cases that if the purchaser at a tax sale must take upon himself the burden of showing the regularity of the proceedings, so that [as is the case as to the sale here complained of], the deed itself is not *prima facie* evidence of title, the owner of the record title was sufficiently protected in this rule of the law, and a bill in equity would not lie on his behalf to remove the lien of the tax, or to set aside the deed after a sale."

Cooley, Tax. (2nd Ed.), 779–781, notes and cases.

And such is the law of this Court.

Hannewinkle *vs.* Georgetown, 15 Wall., 547.

If the hypothesis of the bill as to the illegality complained of be accepted, "any person inspecting the record and comparing it with the law is at once apprised of the illegality;" and as the purchaser "must take upon himself the burden of showing the regularity of the proceedings," the appellee is, on his own hypothesis, in no danger and has no cloud upon his title.

2. The appellee has no right to an action to remove the alleged cloud as to his grantees upon the ground that he has warranted the title and given his grantees bonds of indemnity against the charge in question; he can only be called upon to make his warranty good when occasion arises.

Bissell *vs.* Kellogg, 60 Barb., 617.

And as the bill assails the charge as an entirety, and seeks to have it annulled wholly and as to all the property affected, the necessary parties are not before the court to demand its action in that behalf.

3. He who seeks equity must do equity; and the appellee is not entitled to the relief prayed by him in the absence of a tender of the amount of the assessment complained of, especially as he has been the recipient of a benefit under it.

Apart from the recognized rule on this point, it is proper in vacating a tax, or a sale for taxes, as a cloud upon title to require the party asking the relief to pay any sum that is either a legal or an equitable charge against him and which will be affected by the decree.

Cooley, Tax., 782, note 1, 783.

C.

Apart from the foregoing considerations, the appellant is entitled to have his certificate recognized as a lien upon the lots in question and to have the relief prayed by his cross-bill.

1. The tax for the cost of the work in question was levied by the act providing for the work, *proprio vigore,* and thereby and at once became a lien upon the lots.

The language of the act is plain and specific: "A special tax equal to the cost thereof is *hereby imposed and levied* on ALL lots or parts of lots bordering on the line of the improvement." This fixed a charge upon the lots.

That this result was understood and intended conclusively appears from the provisions of the act governing the assessment and collection of the tax so levied. That act throughout speaks of property already *taxed*, and provides that such property shall alone be answerable for the tax, except in a given case, "in which case the tax levied for the purpose shall become *released*." A tax cannot be "released" which does not already exist as a charge.

And this charge dated from the passage of the act.

"It is the imposition of the tax by law which appropriates, if need be, the property of the citizen to the public use. The lien, therefore, does not commence only with the return of the property, or with the return of the digest by the receiver to the collector, or with the issuing of execution to enforce payment."

Doe *vs.* Deavors, 8 Ga., 479, 483.
Rundell *vs.* Lakey, 40 N. Y., 513, 517.

An assessment of the expenses of widening a street upon the lands abutting thereon is an incumbrance upon such lands from the time of the order of widening; because the lands then and thereby become liable for the payment of those expenses.

Jones *vs.* Boston, 104 Mass., 461, 465.
Blackie *vs.* Hodson, 117 Mass., 181, 183–'4.
Carr *vs.* Dooley, 119 Mass., 294.

2. The lien thus created on the lots in question has never been removed; and a purchaser of the lots after the lien attached was chargeable with notice thereof and with inquiry whether it had become released or otherwise discharged.

Such purchaser making inquiry—and the purchaser from Young was in law bound to do so—would have learned (1) that, as required by law, the commissioner of improvements had deposited in the office of the register "a certified plan of the property *so taxed* . . . subject to the inspection of all interested therein," which plan included the lots in question; (2) that the improvement provided for had been made and "duly accepted" by the corporation; (3) that the work in front of the lots in question had not been done by the owner thereof; and (4) that, accordingly, "the tax laid for the purpose" had not "become released."

He would have learned further the reason that the arithmetical charge against the lots did not appear on the "ward book" or the "special tax ledger," viz: the request of the owner, the only person concerned in its appearing there. And having learned this much he would have known that dispute of the charge was impossible; for the owner's action was an estoppel of all complaint in the premises.

Welty Ass'ts, secs. 210, 318, and cases.
Cooley Tax., pp. 819–821, and cases.

3. The appellee took his title with full knowledge of the charge claimed against the lots, as is not only presumed in the absence of evidence to the contrary—of which there is none—but is also shown by his having indemnified his

grantees against the charge; and having, after the sale complained of, demanded and received a benefit from the work charged for he is estopped to deny its validity.

Welty Ass'ts, sec. 318, and note.

4. And even though the tax-sale certificates be deemed invalid the appellant's title to relief under the assessment certificates is not thereby affected.

HENRY E. DAVIS,
For the Appellant.

APPENDIX.

Mr. Justice MacArthur delivered the opinion of the court.

A majority of the court who heard the argument have come to the conclusion that the decree made in this case ought to be reversed.

The bill is filed for the purpose of removing a could upon the title to real estate of the plaintiff created by a special improvement tax title.

Mr. Alley became the purchaser of these lots, and has filed a bill to remove the cloud of which he complains. The printed statement of counsel collates the statutes which relate to the imposition of taxes for special improvements. It would take some time to analyze these statutes, and perhaps it is unnecessary to do so, because we think a very brief statement of the system can be made without referring to them in detail.

The work was performed in 1870 under the act of the common council of the corporation of Washington that was passed on the 2d of November, 1869, and it is conceded that that ordinance was in conformity to an act of Congress authorizing the common council to make local improvements and to lay and collect taxes upon the lots upon the line of work.

At that time the first step in the process was an ordinance by the common council, and the ordinance in the present case designated the place where the improvement was to be made, on P street, on the north side, between Sixteenth street and Rock creek. To defray the expenses a special tax equal to the amount of the cost was thereby levied upon the lots bordering upon the improvement. The ordinance also provided that that tax should be assessed and collected in conformity with the provisions of the act of October 12, 1865.

Other ordinances provided for the appointment of a superintendent and inspector of streets, who was to make plats, fix the grades, superintend the work, and make assessments upon the lots to defray the cost of the work.

The ordinances required the appointment by the mayor of two assistant commissioners, to be selected from the line of the improvement, and they were to supervise, with the superintendent and inspector, and control the work as it progressed, and the mayor was to pay no bills for this work unless they were signed by these commissioners and by the superintendent.

When the work was completed the inspector and superintendent was charged with the duty, as I have stated, of making the assessment, of summing up the aggregate expense of the work, of stating the amount due from each person, and he was required to deposit this roll of assessment with the register (an officer which no longer exists), and the register was then to put it into the hands of the collector. It then became the duty of the collector to enter it upon what was called a tax ledger kept in his office and notify the parties of the amount due from each within thirty days.

This appears to have been the process at that period of levying taxes for such improvements.

This work was authorized in November, 1869, and the act which authorized it laid and levied the tax. The contract was given to Mr. Birch, who was a professional paver, to pave and curb between Sixteenth street and Rock creek, on the north side of P street north. He entered upon the execution of his contract, and completed it in November following. Mr. William Forsyth was the superintendent and inspector. He prepared the statement for assessment, which I have already described, upon the conclusion of the work and deposited it with the proper officer, the register, who placed it in the hands of the collector. It was then entered on the tax ledger, and presumably he gave the notices and collected the tax.

Now, the lots in question were omitted from that assessment.

This assessment bore the signatures of the street inspectors and of the mayor. It bears date on the 17th of November, 1870. The lots are specified so much for paving, so much for grading, so much for curbing, and so much for guttering, each of these items being in a separate column, and then the total amount is carried out.

It is executed by William Forsyth, superintendent of streets, by Hiram Brown, D. M. Davis, and Robert Armor, assistant commissioners, and on the corner it is approved by M. G. Emery, mayor.

The lots in question are upon the line of this improvement, and they are numbered from one to twelve, between Seventeenth and Eighteenth streets, on the north side of P street, and it is admitted that they were not entered upon this statement at that time nor until a year afterwards. There is a memorandum which embraces lots from one to twelve in red ink, and which reads:

"This work was done at this date, but at request of the owner not entered until November 17, 1871."

And that is signed William Forsyth, surveyor.

Between the completion of the work and the execution of this memorandum public events of considerable importance in the District had occurred. The old corporation had been extinguished, and a District government had been established, with new officers and with provisions in regard to improvements that varied somewhat from those that had preceded it.

It is of vital importance in this case to bear in mind that, at the time the sheet was deposited with the register, there was no mention of these lots.

It appears that Thomas Young, at the time of the improvement, was the owner of the property. He entered into an agreement with the contractor to pay him ninety per cent. of the contract price, and the inducement was that that was more than the contractor would have realized from the sale of the certificates in the market.

About this arrangement there appears to be no dispute; but from the entry it would appear that the owner had requested the superintendent not to make it, and that inference is very natural in view of the arrangement to pay for the work.

Mr. Young, becoming somewhat alarmed at the extensive improvements that were then going on, withdrew from this agreement and notified the contractor that he would not stand by it. In the meantime, on the 12th of October, 1871, Young conveyed the lots to Hallet Kilbourn. That was just one month before the entry was made in red lines.

The complainant states in his bill that Kilbourn searched the assessment-rolls and found that these lots were not assessed; that he had no knowledge of any lien resting upon the property, and that the purchaser was a *bona fide* purchaser without notice. Kilbourn then conveyed to Latta, Latta conveyed to Sunderland, and Sunderland to plaintiff, who took and recorded his title some time in April, 1881, long, however, after the entry in the red ink had been made; but he claims that he took the title unaffected by this assessment, just as Kilbourn did.

And the question is whether the lien to defray the expense of the improvement attached itself in such a way as to affect Mr. Kilbourn with notice.

I have stated that the ordinance of the common council authorizing this work to be done levied and assessed a tax to defray its expense, and we are all agreed that that constituted a lien upon the property.

It is, however, provided in the act that the tax shall be assessed and collected in conformity with the provisions of the acts which I have already enumerated. Until this is done it is very clear that the lien created by the act authorizing the work is inchoate, and that it does not become complete and absolute until the assessment or statement is made by the proper officer.

How can that affect this case? The assessment for the work had been made; it had been made by the proper officer, and there is no fault found with it. That assessment does not exhibit the lots in question as being subject to any lien or to any assessment, and it is stated in the bill that Kilbourn purchased without any constructive or actual notice of the lien of the assessment.

It is to be remembered that the assessments of these lots were not omitted by mistake, or through ignorance or from negligence, but their omission appears to have been intentional and at the request of the party then owning the lots.

Now, can it be possible that the municipal authorities can withhold purposely an assessment at the request of anybody, to the injury of a *bona fide* purchaser? We think not. We are of opinion that Kilbourn, having exercised all the diligence which is required of a *bona fide* purchaser, takes his title free and clear of this tax.

The law requires that a record shall be made of the assessment and it designates the place where this record is to be found. There is no other place to which parties can resort for information. Having exhausted all the information that the law puts them in possession of, we think they have met the obligations required of an honest purchaser.

A position was taken that the party should be required to pay the tax due before he can ask this court to remove the cloud upon his title. That is a very well-established doctrine, both in this court and in the Supreme Court of the United States, in a proper case, and if Mr. Young, the owner of the property, were here seeking to get rid of this tax and this cloud, on account of the fact that the assessment was not made properly, we should require him to come into court with the amount of the tax before granting him any relief.

But Kilbourn does not stand in that position at all. He is a *bona fide* purchaser, and it is on account of this assessment having been intentionally withheld from the assessment-roll that he made the purchase and paid the value of the land.

If this be the case, and I do not see that there is any escape from it, he has paid this tax once in the purchase of the land, and it would be inequitable to call upon him to pay it again.

We do not think, therefore, that this is a case in which that doctrine can be applied.

We are also of opinion that Mr. Alley takes all the title that Kilbourn did. It appears that Mr. Alley received from the District government $788, less or more, as a drawback for material that had been used in this improvement, after he became the owner of the land, and it is said that he is estopped by that circumstance.

While we are not disposed to adjudicate to whom the $788 belongs, we doubt very much if it belongs to Mr. Alley. The District of Columbia, who paid it, is not a party to this proceeding. If the District were here we would probably be inclined to direct him to return it. But we do not think that that affects his title to this property at all. That is a matter in controversy between the parties who may be entitled to it, and so we think our decision ought not to be influenced by it.

For these reasons the court are of opinion that the decree below is erroneous and should be reversed.

Mr. Justice JAMES, dissenting, said:

I have some difficulty on certain points in concurring in the opinion of the majority, and I shall state my reasons very briefly.

Congress gave to the corporation of Washington the power to order these improvements and to charge them upon the land. Under that power they passed this act:

"That the mayor be, and he is hereby, authorized and requested to cause the curbstone to be set and the footways and gutters to be paved on the north side of P street north, between 16th street west and Rock creek; the work to be contracted for and executed in the manner and under the superintendence provided by law; and to defray the expenses of said improvement a special tax equal to the cost thereof is hereby imposed and levied on all lots or parts of lots bordering on the line of the improvement; the said tax to be assessed and collected in conformity with the provisions of the act approved October 12, 1865."

We find in the act of 1865 a reference to earlier acts, and the whole system is laid out plainly.

Now, I think we have agreed as to the effect of this statute, but I lay more emphasis on it than my brethren. The effect of this ordinance was to charge this property with a burden. The assessment was for the ascertainment of the quota of each lot, but the charge was there perfect and absolute. I lay that down more strongly than my brethren. The legal liability of the lot for the tax, the amount of which was to be ascertained, was perfect and cannot be moved by any omissions.

What, then, was the position of this purchaser when he took these lots? He found there was no assessment, but he was warned that the lots were liable. There was perfect evidence that the lots were liable, and he had no knowledge that that liability had been discharged, nor any right to presume that it had been. I am not aware that there is any presumption of law, after you prove an indebtedness, that it is paid. You prove first the debt, and there is a presumption of its continuance.

Then this purchaser had knowledge through this ordinance that there was absolutely a charge on this property. It is true it nowhere appeared that the proportion of each lot had been assessed upon it, but it did appear that the lot was under a charge for whatever its proportion might be.

We find certain proceedings taken afterwards by the claimant of this charge, the owner of this property, which are held to be irregular. There was no assessment on these lots at the time when the assessment was made on the other fifteen lots in the same square. It is said that the assignor of the present defendant had something to do with keeping it off the record. We have been furnished with a stipulation in which it appears as one of the facts that that was done at the request of Mr. Young, the owner of the lots. It is not asserted that it was done by Mr. Birch. Birch says—and I do not find him contradicted anywhere—that he made no stipulation (no bargain, in his language) for any specific time. It is only a piece of guess-work, from the general language of his affidavit, as to whether he made any contract to keep it off. The evidence is that the owner of the lots asked the superintendent and inspector, or perhaps went to the register and asked him, to keep it off the assessment list, and it was kept off.

But all the world was advised that there was a charge on this property, and they had no information that that charge had been taken off.

That charge, whether ascertained by assessment or not, has been assigned to this defendant, and the plaintiff comes here asking relief against the defendant, who owns a charge on this property. The amount was not ascertained by the assessment, but it was a charge, nevertheless. It was not what I call inchoate, though my brethren so view it. It was a charge the exact amount of which was not yet ascertained, but, nevertheless, a perfect charge. And in this bill he asks for relief against a man who has an ascertainable charge upon his property, without offering in any way to settle with him.

Now, the defendant is not entitled himself, as I should say, to the benefits of a certificate of indebtedness bearing ten per cent., but I should require the party to pay the defendant the charge that he owns on the plaintiff's property, with six per cent. interest, before I would give him any relief. The amount can be ascertained, and it is fairly ascertained here. It is the balance of the whole, because after the equity of the other fifteen lots is ascertained, we know exactly what it is. It is $2,045 of original liability. I do not see why the plaintiff is entitled, when we have got this whole matter here, to say that just because this is a cloud, and because he can demonstrate that the legal title claimed by the defendant ought to be brushed away, that he will have that done first, and leave this very defendant afterwards to take steps for the ascertainment of his rights when we know now what they are.

These are the grounds upon which I am compelled to dissent from the conclusion of my colleagues. If the plaintiff will pay this debt he will be entitled to relief, because, I think, this title by purchase cannot stand. But I do not think we ought to help a man who is in debt more or less to the very party against whom he is asking relief unless he offers to pay what is justly due.

DEC 31 1888

JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1888.

NO. 149.

ISAAC S. LYON, APPELLANT,

vs.

JOHN B. ALLEY, APPELLEE.

BRIEF.

H. H. WELLS,
for Appellee.

Beresford, Printer,
Washington, D. C.

IN THE

Supreme Court of the United States.

Isaac S. Lyon,
Appellant,
vs.
John B. Alley,
Appellee.
No. 149.

BRIEF FOR APPELLEE.

Statement.

The complainant was the owner in fee simple of lots from 1 to 12, inclusive, square 156, under deeds commencing with Thomas Young, dated October 2d, 1871, and continued from Young to Kilbourn, Kilbourn to Latta, Latta to Sunderland and Sunderland to Alley.

Alley subsequently subdivided the lots, sold portions thereof, and he and his grantees remain in actual possession, and he has been compelled to give bonds of indemnity to his grantees against the sale and tax certificates held by the defendant, Lyon. The suit was, therefore, brought for the benefit of himself and his grantees.

Lyons claims title to the property under certificates of sale issued to him by the District of Columbia, October 5, 1881.

The bill filed in this case (Record, page 1,) is in the nature of a bill of peace. It alleges the possession and title of the complainant, and asserts that Lyon claims to hold the property under his certificates of tax sales, the tax claimed being for setting the curbstones and paving the foot ways and gutters along the front line of these lots, which created a cloud on the title.

The various statutes under which these proceedings were had, and upon which their legality depends, are as follows:

The Board of Aldermen and Common Council of the City of Washington passed an act on November 2, 1869, (under authority of an act of Congress of February 23, 1865,) as follows:

> "Be it enacted" * * * "That the mayor be and he is hereby authorized and requested to cause the curbstones to be set and the footways and gutters paved on the north side of P street, north, between Sixteenth street, west, and Rock Creek, the work to be contracted for and executed in the manner and under the superintendence provided by law; and to defray the expenses of said improvement a special tax, equal to the cost thereof, is hereby imposed and levied on all lots or parts of lots bordering on the line of the improvement, the said tax to be assessed and collected in conformity with the provisions of the act approved October 12, 1865."
>
> (67 Council, p. 116, Corp. Laws.)

The act of October 12, 1865, referred to in the act quoted above (see page 3, 63 Council,) recites the act of Congress of February 23, 1865, which gave the corporation power to levy taxes in particular wards, &c., and extends the provisions of the acts of May 23 and May 24, 1853, to special improvements thereafter made, and provides *that local improvements, unless otherwise provided for, shall be levied, assessed, collected and paid in the same manner as is provided by the last two acts.*

The material parts of the two acts referred to, May 23, 1853, (Webb's Digest, page 155,) and the act of May 24, 1853, (Webb's Digest, page 232,) are as follows:

The first of the acts provided for proposals for setting curbs, petition for the improvement and plan of the property, time with which the improvement is to be made, and for the appointment of two assistant Commissioners.

The assistant Commissioners are provided for under the 5th section, which with the 6th section contains the only provisions important to be considered in this connection, for they relate to the assessment. The substantial requirement of these sections is that when the work is done, the *Commissioner of Improvements shall deposit a statement with the Register showing the cost of the work, a list of the persons from whom the tax is due and the amount due from each person*, and the Register shall place such list of persons with the amount of tax in the hands of the collector who shall give notice in writing to each person, and of the amount of tax claimed from each.

The act of May 24, 1853, provided for the appointment of Commissioner of Improvements, who, with the consent of the Mayor, were to contract for improvements, and the assistant commissioners were to expend the appropriation, superintend the paving, but no contract should be made without the certificate of the Mayor.

None of the provisions of that act are important in connection with this case.

The next act, that of June 10, 1867, (Webb's Digest, p. 467,) is however, material, for after providing for the appointment of a superintendent and inspector of improvements, who is to prepare plats and fix grades, and to superintend paving of footways, the 5th and 6th sections of that act declare :

> 5. "All sewers, carriageways and footways constructed under the provisions of this act shall be under the exclusive control of the said superintendent and inspector, herein provided for, with two assistant commissioners to be appointed by the mayor, who shall be from among the persons residing on the line of the proposed improvement, or as near thereto as possible, and the mayor shall not pay any bills for work under contract until the same shall have been

approved and the bills therefor signed by the superintendent and inspector, commissioner of the ward, and at least one of the assistant commissioners."

6. "The said superintendent and inspector shall also be charged with the duty of making all assessments on lots or parts of lots bordering on any street, alley or avenue which shall have been paved."

The last act on the subject, that of October 28, 1867, is as follows:

"Be it enacted," * * * "That from and after the passage of this act; all taxes assessed on private property for the construction of sewers, the paving of carriageways in avenues or streets and for the laying of foot-pavements and gutters, curbing and paving alleys, shall be collected as follows: One-fourth of such assessment within thirty days after the service of the notice by the collector of taxes, and the remaining three-fourths in three equal annual payments for which deferred payments it shall be the duty of the mayor to issue certificates of indebtedness, bearing interest at the rate of ten per centum per annum."

The second section repeals all inconsistent acts.

On the 1st of April, 1870, Henry Birch contracted to make this improvement, and it is claimed that the work was done and approved on or before November 17, 1870, for which improvement an assessment was in fact made (a copy of which follows page 6 of the Record), which assessment was duly entered in the record book and was signed by the then mayor, superintendent, commissioner and the assistant commissioner, who certified to and approved the same, and a cancelling line was drawn through the page beginning at the last entry then thereon, to wit, an assessment made against ——— Sterlin on lots 5 and 6, square 151, and extending to the bottom of the page to show where the assessment stopped.

But lots 1 to 12, inclusive, were not upon that assessment and were not assessed, neither did the sheet or assessment referred to contain either the names of the person or persons owning these lots, nor the lots themselves, nor the amount of tax claimed upon the lots or of the owners.

On the 13th day of January, 1871, there was issued to Henry Birch fifty-two certificates of paving stock for the four instalments, being for the entire amount on the assessment roll, which were signed by the proper officers of the Corporation of Washington, but did not refer to either of the lots from 1 to 12, inclusive.

By the Act of February 21, 1871, a new form of government was instituted, and the Board of Public Works succeeded to the powers and duties, in respect to special taxes, of the Corporation of Washington, and on the 1st of June, 1871, Emery, the Mayor, Forsyth, Superintendent and Inspector, and the Commissioner and Assistant Commissioners of Improvements, who had before signed the assessment roll, ceased to hold office or to have any official power in respect to assessing taxes.

By section 37, Act of February 21, 1871, the method of assessing and collecting the cost of special improvements was changed. The Board of Public Works, which was given entire charge of the subject, was required to assess upon the property adjoining and to be specially benefited by the improvement, "a reasonable portion of the cost of improvement not exceeding one-third," while under the old statute the entire cost was to be assessed on the property.

But in November, 1871, after Hallett Kilbourn had become the owner of the property, and after the Corporation of Washington had passed out of existence, and its mayor and superintendent and inspector had gone out of office, and the assessment had been made and the work paid for by the certificates, as mentioned above, the canceling line that marked the end of the list of owners, and of the lots assessed and of the assessment, was partially erased, and in the space thus made a description of lots from 1 to 12, inclusive, was entered under the name of Thomas Young, former owner, and the sum of $2,050 inserted against said lots, and as explanatory of such insertion the following was written on said sheet:

> "This work was done at this date, but by the request of the owner not entered until November, 1871.
>
> "WILLIAM FORSYTH,
> "*Surveyor.*"

Which interlineations constituted the only assessment ever made upon said lots. (Record, page 20.)

The Thomas Young mentioned in the Forsyth memorandum remained the owner of these lots until he conveyed them to Kilbourn on October 2, 1871, at which time there was no entry of any assessment, and Kilbourn purchased without notice.

On the 9th of March, 1872, four certificates were issued to Henry Birch, (Record, page 7,) as and for the cost and tax for making the improvement in question in front of lots 1 to 12, inclusive, which certificates gave the 17th of November, 1871, as the date from which interest was to be computed, and the only authority for the issuance of these certificates was the interlineation made in the assessment sheet, as before stated.

The Board of Public Works was abolished June 20, 1874, but during its lifetime, to wit: From June 1, 1871, to June 20, 1874, it caused no assessment to be made, and the Commissioners of the District of Columbia, who succeeded on the 20th of June, 1874, to the rights and duties of the Board of Public Works, made no assessment on said lots for such improvement; but on July 29th, 1875, Birch having assigned said four last named certificates to the defendant, Lyon, the District of Columbia and John F. Cook, collector, having advertised said lots for sale as delinquent, James M. Latta, who was then the owner of said lots, filed his bill in equity cause, No. 4,450, against the District of Columbia and Cook, collector, to enjoin the sale thereof, and a restraining order was granted on that day, which still continues in force. (Record, page 21.)

On the 5th of October, 1881, the District of Columbia and John F. Cook, at the request of the defendant Lyon, undertook to sell these lots, and Lyon bid in the said lots and received twelve certificates of sale and paid for the same with his said four certificates. (Record, page 8.)

These certificates also bear interest as from November 17, 1871.

The bill prays that the pretended assessment may be decreed to be without authority of law, and that the tax certificates be decreed to constitute no lien upon the said lots, and alleges that the said sale was null and void and the certificates of sale were issued without authority of law, and prays that the defendant, Lyon, be enjoined from setting up any title to the property by virtue of the premises.

The defendant, Lyon, claims title under said sale, prays payment of the alleged lien from Alley, or that the District of Columbia may be held liable for the amount thereof. (See answer page 9, and cross-bill page 14, Record.)

Which cause having afterwards come on for hearing and having been duly heard, a decree was entered therein in General Term on February 18, 1885, which adjudged that the alleged special assessment on said lots from lots 1 to 12, did not create any lien on the said premises as far as the complainant was concerned, that the said lien certificates and the twelve certificates of sale and the sale were illegal and void, and gave no right or estate in law or in equity in or to said lots, and the defendant, Lyon, was enjoined and restrained from setting up, using or employing said assessment, lien certificates or certificates of sale, or from claiming any right thereunder to any of said twelve lots, and that the title of the complainant and his grantees is free and relieved from the said cloud, that the defendant's cross-bill be dismissed, from which decree Lyon appealed. (Record, pages 26 and 27.)

BRIEF.

The bill in this case is a bill to quiet title to land; it alleges the possession and title of the complainant, and asserts that Lyon, appellant, claims title to the lots in question by virtue of lien certificates and a sale and purchase thereunder, which claim throws a cloud upon the title of the complainant and his numerous grantees, to whom he has been compelled to give bonds of indemnity against said tax sale, and the bill brings the case under acknowledged heads of equity jurisdiction.

Alley and his grantees are in adverse possession, they have a title in fee simple, the parties are numerous, the tax sale operates as a cloud upon his and their title, he has no adequate remedy at law, but the whole question can be settled by one issue in equity and this is therefore the proper remedy.

The appellee's case rests primarily on the doctrine that the removal of a cloud upon the title to real property is a well recognized and established ground for equitable relief, even where the cloud is caused by an illegal tax.

Holland *vs.* Challon, 110 U. S., p. 15.

Union Pacific R'y Co. *vs.* Cheyenne, 113 U. S., page 516.

Chapman *vs.* Brewer, 114 U. S., page 158.

In the first of these cases the Court say: "The jurisdiction to relieve the holders of real property from vexatious claims to it, casting a cloud upon their title and thus disturbing them in its peaceable use and enjoyment, is inherent in a court of equity." Again, "No adequate relief to the owners of real property against the adverse claims of parties not in possession can be given by a court of law. If the holders of such claims do not seek to enforce them the party in possession, or entitled to possession—the actual owner of the fee—is helpless in the matter unless he can resort to a court of equity."

In the Union Pacific Railway case, cited above, the Court say, at page 525:

> "Even the cloud cast upon his title by a tax under which such a sale could be made would be a grievance which would entitle him to go into a court of equity for relief."

In Chapman's case, 114 U. S., the Court say, at page 171: "The claim of the defendants under the levies is one which ought not to be enforced. It has no validity as against the rights of the plaintiff. It throws a cloud on his title. He is in possession and cannot sue at law, and the papers supporting the defendant's claim are not void on their face;" and quotes with approval what was said by the Court in O'Hare *vs.* Downing, "A court of chancery will restrain by injunction a threatened levy of execution upon real estate which is not legally subject to such levy, and thus prevent a cloud upon the title without compelling the owner of the land to wait until the levy has been completed and then admit himself to be disseized, in order to maintain a writ of entry; much more would it prevent a sale after a levy."

These lien certificates, the sale thereunder and the tax deed given in pursuance thereof, were not simply a cloud, but the statute declares that the certificates shall remain and be a lien on the property until paid.

"Until paid, the assessment and certificate shall remain and be a lien on the property on or against which they shall have been issued;" and further, that if not paid within one year the property shall, on the application of the holder of the certificate, be sold; and "upon such sale there should be executed and delivered a tax deed to the purchaser, which deed should convey a complete title to the property in question."

Sec. 3, Act August 10, 1871, First Legislative Assembly, page 31; also Third Legislative Assembly, page 39.

This last statute, section 3, Act of March 29, 1873, extends the time of payment but has the same provision as to sales.

The doctrine, which has sometimes been applied, that the collection of *taxes* will not be restrained, does not apply to special assessments made by municipal authority, and it was so decided by the Supreme Court of the District of Columbia in R. R. and B. Co. *vs.* District of Columbia, 1 Mackey, 217.

"We are of opinion," that Court say, "that the general language used in the classes of cases referred to applies to taxes levied by the Sovereign alone," and cites and quotes with approval:

High on Injunctions, 369.
Webster *vs.* Connors, 51 Md., 395.
State Railway cases, 92 U. S., 613.

The language of this Court in State Railway Cases, 92 U. S., though the question was not decided, is very persuasive on that subject.

Of the steps necessary to create a legal charge on the premises in question, the only one taken in this case and as to these lots was the passage on the 2d of November, 1869, by the Corporation of Washington, of an ordinance authorizing the mayor "to cause the curbstones to be set and the footways and gutters paved on the north side of P street north, between Sixteenth street west, and Rock Creek."

All the other steps, viz., the listing of the owners of these lots, with a statement of the amount due from each, the notice in writing to each person of the amount of tax claimed from each, the assessment on the lots, and the issuing of certificates of indebtedness in four equal instalments for the amount of said tax, were omitted. So that if the lien certificates, the certificates of sale, and the sale itself, can stand and be held valid, it is because of the passage of the ordinance indicating where the improvement was to be made, (north side of P street, between Sixteenth street and Rock Creek, six blocks in all,) and directing the manner in which the tax should be assessed and collected.

We maintain that the passage of that ordinance was only the voting of the tax, "a levy upon the people"—the legislative act which determined "that a tax should be laid," and that it accomplished nothing more, but that there was no assessment or apportionment of that tax upon the twelve lots in question.

In Cooley on taxation, page 286, it is said, "There must be a voting of the tax by the proper authority; there must be an assessment and an apportionment," and at page 324 it is further said: "The power to tax being legislative, there must be distinct authority of law for every levy upon the people under that power." * * * "The term levy is used in this chapter as meaning the legislative act, whether State or local, which determines that a tax shall be laid."

At page 351 the author adds: "An assessment consists of two processes, of listing the persons, property, etc., to be taxed, and of estimating the sums which are to be the guide in an apportionment of the tax between them."

In this case the levy, the voting of the tax, was done, but nothing more. As to this property, there was no assessment, nor any other lawful step taken.

"Each step, from the assessment of the land to the delivery of the deed, must be taken; and, in a controversy as to the title, must be established by proof." * * * "The general doctrine is beyond question that the deed, until the prerequisites of the tax laws are established, is a nullity."

Burroughs on Taxation, 332, and cases.
Blackwell on Tax Titles, pp. 33, 34, 35, and cases.
Williams *et al. vs.* Peyton, 4 Wh., 77.
Parker *vs.* Overman, 18 H., 137.
Amehurst *vs.* Somers, 2 Tenn., 372.
Coleman *vs.* Anderson, 10 Mass., 17.
Agry *vs.* Young, 11 Mass., 220.
Stetson *vs.* Kempton, 13 Mass., 282.
Libby *vs.* Burnham, 15 Mass., 144.
Williams *vs.* Brace, 5 Conn., 190.
Fame's Man'f. Co. *vs.* Lathrop, 7 Conn., 550.
Marsh *vs.* Chesnut, 14 Ill., 223.
Rivers *vs.* Thompson, 43 Ala., 633.

These cases are selected from the multitude which embrace almost every variety of conceivable defects.

In Thatcher *vs.* Powell, 6 Wh., 119, the Court say the execution by a public officer of a power to sell lands for the non-payment of taxes must be in strict pursuance of the law under which it is made, or no title is conveyed.

In Mason *vs.* Fearson, 9 How., 248, which was a case where at the sale more than enough lots were bid off to satisfy the tax.

At page 260 the Court say:

> "It is well settled that where a tax title is to be made out by a party," * * * "it must be done in all material particulars fully, clearly." * * * "In the language of some of the cases, it must be done 'strictly,' 'exactly,' 'with great strictness.'"

Where a statute requires a series of acts to be performed before the owners of property are properly chargeable with the tax, such acts are conditions precedent to the exercise of the power to levy the tax, and all the requirements of the statute must be complied with or the tax cannot be collected.

Hewes *vs.* Reis, 40 Cal., 255.
Hillard's Law of Taxation, page 307, sec. 34.

The assessment or listing for taxation is not only absolutely necessary, but it must be in strict compliance with the law in order to give the proceeding validity.

"The first important step is to show that the land was listed for taxation. On this depends the validity of the subsequent proceedings."

Games *vs.* Stiles, 14 Pet., 326.
Burroughs on Taxation, 203.

The provisions of a municipal charter, in reference to the mode of assessing and collecting taxes, must be substantially pursued or the tax will be invalid and cannot be legally collected.

Powell *vs.* Madison, 21 Ind., 535.

"That portion of the tax complained of rests on no assessment made by any authority of law, and is therefore void."

Kimball *vs.* Merchants' S. L. and T. Co., 89 Ill., 611.

An assessment becomes an essential part of the process in the collection of taxes.

Marsh *vs.* Supervisors, 42 Wis., 502.

The particular defect in that case was that the statute required an affidavit, showing certain things to have been done to be attached to the assessment. No affidavit was filed, but proof was offered *aliunde* to show that the required acts were in fact performed, and that the amount of tax assessed was the correct amount actually due. The Court said:

"An illegal tax is none the less illegal because it may happen to be the same or even less than a legal tax might have been, whereas in this case the whole assessment was a fraud upon the law."

There can be no valid claim for a tax where there has been no assessment.

Worthington *vs.* Whitman, 67 Iowa, 190.

No provision of any statute for levying taxes, which are for the protection of the citizen, can be deemed merely directory; but all such statutes are mandatory. Exact compliance with the statute is an essential to divest the owner of his property. The title depends upon no equity, consent or concession upon his part. He may demand fulfillment to the last particular of every substantial provision.

And that was substantially said by the Supreme Court, District of Columbia, in King *vs.* The District, MacArthur and Mackey, p. 36.

"While it is doubtless the duty of the citizen to pay all taxes legally assessed upon him for the support of the government, yet the validity of the proceedings, taking his land against his will, in discharge of his taxes, depends upon no consideration of equity, but upon a strict compliance on the part of municipal officers, with the regulations previously prescribed by statute, for the double purpose of securing the payment of the tax and of protecting the citizen against unnecessary sacrifice of his property."

Forster *vs.* Forster, 129 Mass., 559.

The requisitions of the (tax) law are substantial and useful and cannot be dispensed with.

Hughey *vs.* Howell, 2d Ohio, 233.

In deciding on tax titles great strictness has always been observed. * * * A collector who sells land for taxes must act in conformity with the law from which he derives his power and the purchaser is bound to inquire whether he has done so or not. He buys at his peril, and cannot sustain his title without showing the authority of the collector and the regularity of the proceedings.

Holt's heirs *vs.* Hemphill's lessees, 3 Ohio, 233.
Stead's Ex'rs *vs.* Carnes, 4 Cran., 412.

When the statute under which the sale is made directs a thing to be done or prescribes the form, time and manner of doing any thing, such thing must be done in the form, time and manner prescribed or the title is invalid, and in this respect the statute must be strictly, if not literally complied with.

Chandler *vs.* Spear, 22 Vt., 388, citing—
Spear *vs.* Ditty, 9 Vt., 282.
Bellaws *vs.* Elliot, 12 Vt., 569.
Sumner *vs.* Sherman, 13 Vt., 909.
Carpenter *vs.* Sawyer, 17 Vt., 122.

In Kneeland *vs.* City of Milwaukee, 18 Wis., 411, an act authorized the laying of a sewer and required that a plan thereof should be first made and filed, which was not done. But the sewer was constructed and an assessment made.

The court held that the making of the plan was a condition precedent, citing:

Merrick *vs.* LaCrosse, 17 Wis., 442, and says—

> "It is a general rule when measures are authorized by statute in derogation of the common law which may result in divesting the title of one person to land and transferring it to another, that every requisite having the semblance of benefit to the owner must be strictly complied with." And cites—

Atkins *vs.* Kenna, 20 Wend., 241.

The provisions of the statute as to the form of warrants and *tax lists and the place where lists shall be deposited* are intended for the benefit of the taxpayer.

Sandwich *vs.* Fish, 2d Gray, 298.

A listing and valuation of the land for taxation within the time and in the manner required by law is essential to the validity of a tax title. This is a prerequisite which cannot under any circumstances whatever be dispensed with.

Blackwell on Tax Titles, chap. 5, page 106.

All of the defects and omissions of acts essential to the validity of a tax title in this case are acts, the non-performance of which could not be dispensed with, as they were of the most fundamental character and intended for the protection of the citizen.

In French *vs.* Edwards, 13 Wall., 506, at page 511, the Court say:

> "But when the requisitions prescribed are intended for the protection of the citizen and to prevent a sacrifice of his property, and by a disregard of which his rights might be, and generally would be, injuriously affected, they are not directory, *but mandatory*. They must be followed or the acts will be invalid. The power of the officer in all such cases is limited by the manner and conditions prescribed for its exercise."

At page 514 the Court say:

> "They (the cases) all proceed on the principle stated by the Supreme Court of Michigan, that what the law requires to be done for the protection of the taxpayer is mandatory, and cannot be regarded as directory merely."
>
> Citing Clark *vs.* Crane, 5 Mich., 154.

The ordinance, the legislative act by which the tax was laid and its assessment became possible, required "the said tax to be assessed and collected in conformity with the provisions of the act approved October 12th, 1865," which act (October 12, 1865,) extends the provisions of the acts of May 23 and May 24, 1853, to special improvements thereafter made; and provides, *that local improvements, unless otherwise provided for, shall be levied, assessed, collected and paid in the same manner as is provided by the last two acts.*

And the 5th and 6th sections (Act of May 23, 1853,) required, as we have before seen, that *the commissioner of improvements shall deposit a statement with the register showing the cost of the work, a list of the persons from whom the tax was due, and the amount due from each person; and the register shall place such list of persons with the amount of tax in the hands of the collector, who shall give notice in writing to each person of the amount of tax claimed from each.*

This provision of the statute is specific, precise and mandatory. Every one of these requirements, in the language of the Supreme Court, "are intended for the protection of the citizens," and the omission of any one of them would render the tax sale void, for the list deposited with the register did not contain these lots from 1 to 12, inclusive. So as to them there was no statement of the cost, no list of the persons from whom the tax was due, no amount stated to be due from any person, and no such list as to them was placed in the hands of the collector.

The record (copy of assessment roll, following page 6,) shows that an attempt was made to comply with these provisions of the law. The statement was deposited which did show the cost, a list of the persons from whom the tax was due, the amount due from each, and the same was placed in the hands of the collector, who did give notice in writing to each person whose name was found on the list, of the amount of tax claimed from each. That paper was dated November 16, 1870, and was signed by M. G. Emery, mayor, Wm. Forsyth, superintendent of streets, Hiram Brown, commissioner, D. M. Davis and Robert Armor, assistant commissioners, and on the 13th of January, 1871, fifty-two lien certificates were issued for the entire cost, tax and charge of said improvement, but neither of the twelve lots in question, nor any part of either, was on said assessment roll or sheet, nor was the name of the then owner thereon, nor the name of the complainant, or any person from whom he derived his title, nor the name of Thomas Young, who remained the owner of the property until October 2, 1871, eleven months after the assessment was made and nine months after the lien certificates were issued as a payment for the work.

If the case stopped here, of course it would be conceded that the whole proceedings as to these lots was null and void *ab initio*; but it is said that after the lists had been made out by the proper officers, which did not contain this property, and after the lists as made out had been signed, completed and filed, and certificates issued to the contractor in payment of all the tax mentioned therein, and after the property had been sold by Young, the then owner, to Kilbourn, Alley's grantor, who was an innocent purchaser without notice and who had searched the record and found no tax assessment recorded therein, William Forsyth, surveyor, an authorized person, might, after the dissolution of the old government and the incoming of the new, and after the mayor, superintendent and inspector and commissioner and assistant commissioners had all gone out of office and their offices been abolished, and without their consent or knowledge lawfully proceed to alter and amend said list, and add thereto other property not before included and the names of persons not before found on such completed list. Not only so, but he could make these additions and alterations not only at any time after he had gone out of office, but at any time during his natural life, and it may be added, might add not only these but any other lots and squares of any other persons. This proposition seems so extreme and unreasonable as to be beyond the range of argument, but neither the particular certificates that were issued nor the sale or tax deed thereunder that was made can be sustained unless the power of Forsyth to make such alterations is conceded.

It will be remembered that these alterations of the list were made nearly a year after the list was completed; after the mayor, commissioner, assistant commissioners and superintendent and inspector, who were required to sign the list and had in fact signed it, had gone out of office, and after the form of government under which the assessment was to be made had been abolished, and after other officers had been empowered by law under new methods to make such assessments; and it will be remembered too that these additions and such alterations were subsequently made, not by said mayor, commissioner and assistant commissioners and said superintendent and inspector, under oath or with the consent of said four officers, but only by Wm. Forsyth, without any consent of the other officers, and after he had ceased to be such superintendent and inspector.

Section 6, Act of June 10, 1867, required that the assessment should be made by the superintendent and inspector.

If there had been a change in the incumbent of that office, Forsyth being removed and a new one appointed after such making of the assessment and filing thereof, but before the unauthorized and illegal alteration, which of the two could make such alteration? Certainly not both, and surely we should suppose it would be the incumbent of the office, because the power and duty attached to the office and not to the person.

"The assessor acts under a special and limited authority, conferred by law and not by the owner of the estate. He is the mere instrument to pass the title. The proceeding is construed strictly and the power must be strictly pursued in every particular. Every prerequisite to the power to sell the estate must precede its exercise."

Davis *vs.* Farnes, 26 Texas, 296.
Yunda *vs.* Wheeler, 9 Texas, 408.
Robson *vs.* Osborn, 13 Texas, 298.
Wafford *vs.* McKinney, 23 Texas, 36.

To justify the act of Forsyth complained of, we are compelled to assume that he could have made this entry at any time, that he could have kept, at the request of the owner or other party, or by agreement, the assessment off the record for an unlimited period, and implies the power to alter, in a vital particular, a completed instrument and record duly signed, propositions that are against the whole current of authority.

In Hartwell *vs.* Littleton, 13 Pick., 229, the Court say: "Of course an amendment could not be made by one who was no longer in office, as under such circumstances it would not be an official act."

Mr. Cooley says: "Corrections cannot be made by intendment unless the necessary facts appear either in the record as actually made or in official documents on file, from which the record should have been drawn up. Courts cannot imply facts, which are not recited anywhere in the official proceeding."

Cooley on Taxation, 314.

No amendment can make valid a tax sale that was void for want of proper description of the land in the assessment and subsequent proceedings.

Cooley on Taxation, p. 323.

A tax levied without any list and valuation is void.

Same book, 259, and cases cited there.

After an assessment has been made and entered in the tax book, the same cannot be increased without notice to the taxpayer.

People *vs.* Ward, 105 Ill., 620.
O'Connor *vs.* Mullen, 11 Ill., 57–116.

It is not allowable in any case for a ministerial officer, either with or without the permission of a superior court, so to amend his record as to render a sale valid which was invalid before.

Langdon *vs.* Poor, 20 Vt., 13.
Judevine *vs.* Jackson, 18 Vt., 470.
Atkins *vs.* Hinman, 2 Gilman, 451.

"The construction of the statute," says this Court, "will be recognized to be in harmony with the policy of the law which experience has established to protect the ownership of property from divestiture by statutory sales, when there has not been a substantial compliance with the law, by which a public officer is empowered to sell it."

"Any assumption of the officer appointed to make the sale or disregard of them the law discountenances. He may not do anything of himself, and must do all as he is directed by the law under which he acts."

Early *vs.* Dove, 16 H., 610.
Rankendorf *vs.* Taylor's Lessee, 4 Pet., 349.
Stead's Ex'r *vs.* Course, 4 Cr., 403.

"It is impossible to sustain a power in the officer who sells land for the non-pament of taxes, or of any officer connected with the proceedings, to amend the record of their acts after they have been made."

Blackwell on Tax Titles, 359–362, and cases.
Blight *vs.* Barks, 6 Monroe, 206.
Blight *vs.* Atwell, 7 Monroe, 268.

Another consideration of some importance is this: The Act of February 21, 1871, which was in force at the time Forsyth undertook to alter the original tax list, authorized the Board of Public Works to make assessments, and limited the amount to be charged to one-third of the cost of the improvement, and any assessment made after the repeal of the old statute must be made under the statute in force, as the Supreme Court, District of Columbia, decided in the case of Board of Public Works *vs.* Mayor of Washington *et al.* (This case is not reported.)

It is a well settled principle that when a statute is repealed it must be considered as to all transactions *in fieri* closed.

Dwarris, 676.
Smith's Commentaries, 89.
Blackwell on Tax Titles, 433.
McQuilken *vs.* Doe., 8 Blackford, 581.
Shoat *vs.* Walker, 6 Kansas, 65.

It is claimed, however, that this case is outside of that rule, because the work was alleged to have been done before the repeal of the statute; but that is not a fact that appeared in the record. Forsyth, an unofficial person without authority of law, makes a memorandum to that effect; but when the certificates were issued to Birch for this work they, as we see by an inspection of a copy thereof in the record, (page 7, Record,) provided that the interest should commence to run from November 17, 1871, which must be taken to be the date of the assessment.

This extraordinary and illegal method opened the door of necessity to unlimited frauds, for when Alley's grantor bought there was no record, note or memorandum of this tax in the tax office or the records thereof from which he could learn of the incumbrance, and it was a fraud upon his rights to allow an assessment to be subsequently made and put upon the record, and that to be done by the District through its officers in confederation with Young, the then owner of the property, who by the device relieved himself from the tax and undertook to transfer it to his grantee without notice.

The position of Birch, by whom the work was done and to whom the certificates were finally issued, was this. He, by taking Young for the price and withholding the property from assessment, was estopped from calling upon the subsequent purchaser without notice, and whatever fraud he was chargeable with, Lyon is also charged with notice of, for at the time he purchased the certificates the record disclosed the fact that the property had thus been illegally withheld from assessment.

If there had been an accidental omission of property from the tax list without the fault of Birch, whereby he might lose some part of the contract price for making the improvement, the remedy would have been convenient and adequate; for if the tax was a legal charge, an application might have been made for an assessment, such as is provided for by the 13th section of the act of March 3d, 1883: "If the Assessor of the District shall learn that any property liable to taxation has been omitted from the assessment for any previous year or years, or has been so assessed that the assessment was void, it shall be his duty to reassess," on the assumption that the property was originally chargeable for the improvement, and while the amount could not be collected by a forced sale, it could be by a proper proceeding in the courts; but in no event could this extraordinary method be resorted to.

The tax sale in this case was further void because in violation of injunction.

It will be remembered that on June 29, 1875, Latta filed his bill in Equity in cause No. 4450 and obtained a restraining order on the District of Columbia and its officers, enjoining them from the sale of these lots for the payment of the certificates held by Lyon; and that that order is still in force.

The District of Columbia and its officials however sold these lots on October 5, 1881, in violation of this order.

"An act done by a party, in violation of an injunction issued against him, will be deemed ineffectual, as to the purpose intended by him; therefore if he take possession of the premises under a writ of possession which he has been enjoined from procuring, his possession is unlawful and the party injured will be relieved as well by a writ of forcible entry and detainer at law, as in chancery. So where after an injunction against proceedings under an execution, the officer sells property levied upon before the injunction, he becomes a trespasser *ab initio.*"

Hilliard on Injunctions, p. 146, Sec. 21, b.

After the issuance of the restraining order the District of Columbia not only could not make a lawful sale but they could convey no title to another, for one who buys at a judicial sale or a public tax sale, buys with notice of all defects and disabilities and the regularity of the proceedings, resulting in the restraining order cannot be inquired into collaterally. It is enough that the court had jurisdiction as it confessedly had in this case.

The injunction must be respected and obeyed, and all proceedings had, before its dissolution, are in violation of it.

This case is reported in 3d Mackey, 457. The opinion, after referring to the act which requires that the tax shall be assessed and collected in conformity with the provisions of the enumerated acts, says:

"Until this is done it is very clear that the lien created by the act is inchoate, and that it does not become complete and absolute until the assessment or statement is made by the proper officer.

"How can that affect this case? The assessment for the work had been made; it had been made by the proper officer and there is no fault found with it. That assessment does not exhibit the lots in question as being subject to any lien or any assessment, and it is stated in the bill that Kilbourn purchased without any constructive or actual notice of the lien of the assessment.

"It is to be remembered that the assessment of those lots was not omitted by mistake, or though ignorance or from negligence, but their omission appears to have been intentional and at the request of the party then owning the lots.

"Now, can it be possible that the municipal authorities can withhold purposely an assessment at the request of anybody, to the injury of a *bona fide* purchaser? We think not. We are of opinion that Kilbourn, having exercised all the diligence which is required of a *bona fide* purchaser, takes his title free and clear of this tax.

"The law requires that a record shall be made of the assessment, and it designates the place where this record is to be found. There is no other place to which parties can resort for information. Having exhausted all the information which the law puts them in possession of, we think they have met the obligation required of an honest purchaser." (See pages 484, 485.)

It was insisted below that the complainant should be required to pay the amount of tax and interest before the burthen or cloud would be removed from his title.

The Court below stated the doctrine on that subject as follows:

"A position was taken that the party should be required to pay the tax due before he can ask this Court to remove the cloud upon his title. That is a very well established doctrine, both in this Court and the Supreme Court of the United States, in a proper case, and if Mr. Young, the owner of the property, were here seeking to get rid of this tax and this cloud on account of the fact that the assessment was not made properly, we should require him to come into Court with the amount of the tax before granting him any relief.

"But Kilbourn does not stand in that position at all. He is a *bona fide* purchaser, and it is on account of this assessment having been intentionally withheld from the assessment roll that he made the purchase and paid the value of the land.

"If this be the case, and I do not see that there is any escape from it, he has paid this tax once in the purchase of the land, and it would be inequitable to call upon him to pay it again. We do not think, therefore, that this is a case in which that doctrine could be applied."

The general doctrine as to the necessity of a tender in cases similar to this is stated as strongly as anywhere else in State Railroad Tax Cases, 92 U. S., 575. At page 617 it is said:

> "Before complainants seek the aid of the Court for relief from excessive tax, they should pay what is due. Before they ask equitable relief, they should do that justice which is necessary to enable the Court to hear them." * * * "It is not sufficient to say in the bill that they are ready and willing to pay whatever may be found due. They must first pay what is conceded to be due, or what can be seen to be due on the face of the bill."

In National Bank *vs.* Kimball, 103 U. S., 732, the whole subject is again reviewed and the Court say: "As a general rule the owner of taxable property who seeks to enjoin the collection of a tax thereon, which he alleges to be in excess of what is lawful, must first pay or tender so much as is justly due."

That was a case where the allegation was that the property was assessed too high.

Cooley on Taxation, at page 762, states the proposition thus:

"The courts also have sometimes imposed conditions to equitable remedies where they have deemed public interests demanded it; thus when an injunction has been applied for to restrain the the collection of a tax partly legal and partly not, the Court has made the payment of the legal a condition precedent," and he cites the following language from Clement *vs.* Everest, 29 Mich., 19:

> "If the bill shows precisely the amount of the excess of the taxes which are claimed to be illegal, and only asks to have the collection of the illegal taxes restrained, the bill will not be dismissed for want of a formal offer to pay the legal taxes."

So much of the tax as is conceded ought to be paid, must be tendered or the injunction will be refused.

Huntington *vs.* Palmer, 7 Sawyer, 355.
Morrison *et al. vs.* Hershire, 32 Iowa, 271.
Grummell *vs.* City of Des Moines, 57 Iowa, 144.
Miller *vs.* Corbin, 46 Iowa, 150.
Everett *vs.* Beebe, 37 Iowa, 452.
Connors *vs.* Detroit, 41 Mich., 128.
Phillips *vs.* Harding, 87 Ill., 442.

These are cases of the same general character as those cited above, but are not materially different in their principles from 92 U. S., 575.

The theory of the present case is that nothing is due; there was no legal assessment, there was no equitable obligation to pay anything. The complainant had bought the property, including the full value of the property as it then was, paying a full price without any actual or constructive notice of any tax, no assessment or notice of the tax was in the tax office or upon the record where by law it was required to be placed.

There was no notice brought home to Kilbourn that any tax was due, and Mr. Justice James, dissenting, fell into the error of supposing the contrary, for he says, (487, 3d Mackey,) "The purchaser had knowledge, through this ordinance, that there was absolutely a charge on this property. It is true it nowhere appeared that the proportion of each lot had been assessed upon it, but it did appear that the lot was under a charge for whatever its proportion might be."

And later the same judge says, "But all the world was advised that there was a charge on this property, and they had no information that that charge had been taken off."

This, we respectfully submit, cannot be so. All the information which that ordinance gave was that all the land between Sixteenth street and Rock Creek, six or seven blocks, was to be improved, but gave no notice that the improvement had been made. The ordinance only gave notice of what it contained, to wit: that the mayor was "authorized and requested" to have the improvement made, and it was therefore impossible to know what the tax on this property would be, because the expense in each particular case and as to every lot depended largely upon the grading and filling which each required.

Besides, an interest of ten per cent. per annum, more than one hundred per cent. in all, was added to and embraced in these lien certificates.

Again, if a tender was made, was it to be under the act in force in 1870, when the owner of the property was to pay the whole of the tax, or was he to make the tender under the law in force when Forsyth undertook to make the entry, under which last law the owner would have to pay only one-third of the tax.

Under the first act when the assessment was made, the owners of the property were to pay the entire expense of the improvement, and by Sec. 37, Act of February 21, 1871, in force at the time Forsyth undertook to make the unauthorized entry, the Board of Public Works was required "to assess upon the property adjoining, and to be specially benefited by the improvement a reasonable portion of the cost of improvement, *not exceeding one-third.*"

This consideration, we think, renders it plain and obvious that this was not a case in which a tender could be required as a condition upon which the relief prayed for could only be granted.

H. H. WELLS,
Solicitor and of Counsel for Appellee.